No. 16-6795 *** CAPITAL CASE ***	
Title:	**Carlos Manuel Ayestas, aka Dennis Zelaya Corea, Petitioner** **v.** **Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division**
Docketed:	November 9, 2016
Linked with 16A130	
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(15-70015)
Decision Date:	March 22, 2016
Rehearing Denied:	June 10, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Aug 05 2016	Application (16A130) to extend the time to file a petition for a writ of certiorari from September 8, 2016 to October 24, 2016, submitted to Justice Thomas.
Aug 10 2016	Application (16A130) granted by Justice Thomas extending the time to file until October 24, 2016.
Oct 14 2016	Application (16A130) to extend further the time from October 24, 2016 to November 7, 2016, submitted to Justice Thomas.
Oct 19 2016	Application (16A130) granted by Justice Thomas extending the time to file until November 7, 2016.
Nov 07 2016	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 9, 2016)
Dec 05 2016	Order extending time to file response to petition to and including January 9, 2017.
Dec 23 2016	Order further extending time to file response to petition to and including February 8, 2017.
Feb 08 2017	Brief of respondent Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.

Feb 23 2017	DISTRIBUTED for Conference of March 17, 2017.
Feb 23 2017	Reply of petitioner Carlos Manuel Ayestas, aka Dennis Zelaya Corea filed. (Distributed)
Mar 20 2017	DISTRIBUTED for Conference of March 24, 2017.
Mar 27 2017	DISTRIBUTED for Conference of March 31, 2017.
Apr 03 2017	Motion of petitioner to proceed in forma pauperis is granted. The petition for a writ of certiorari is GRANTED limited to Question 2 presented by the petition.
Apr 10 2017	Motion to appoint counsel filed by petitioner Carlos Manuel Ayestas, aka Dennis Zelaya Corea.
May 05 2017	Consent to the filing of amicus curiae briefs, support of either party or of neither party, received from counsel for respondent.
May 05 2017	Consent to the filing of amicus curiae briefs in support of either party or either party from counsel for the petitioner.
May 12 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 9, 2017.
May 12 2017	The time to file respondent's brief on the merits is extended to and including August 1, 2017.
May 16 2017	Motion to appoint counsel DISTRIBUTED for Conference of June 1, 2017.
Jun 05 2017	Motion to appoint counsel filed by petitioner GRANTED. and Lee B. Kovarsky, Esquire, of Baltimore, Maryland, is appointed to serve as counsel for the petitioner in this case.
Jun 09 2017	Joint appendix filed. (Statement of costs filed)
Jun 09 2017	Brief of petitioner Carlos Manuel Ayestas, aka Dennis Zelaya Corea filed.
Jun 16 2017	Brief amici curiae of The National Association of Criminal Defense Lawyers,and The American Civil Liberties Union filed.
Jun 16 2017	Brief amicus curiae of The Constitution Project filed.

Jun 16 2017	Brief amicus curiae of The American Bar Association filed.
Jun 16 2017	Brief amicus curiae of The Capital Punishment Center of the University of Texas at Austin School of Law filed.
Aug 01 2017	Brief of respondent Lorie Davis, Director, Texas Dept. of Criminal Justice, Correctional Division filed.
Aug 08 2017	Brief amici curiae of States of Arizona, et al. filed.
Aug 31 2017	Reply of petitioner Carlos Manuel Ayestas filed.
Aug 31 2017	SET FOR ARGUMENT on Monday, October 30, 2017
Sep 07 2017	CIRCULATED
Sep 12 2017	Record requested from the U.S.C.A.5th Circuit.
Sep 28 2017	Record received from the U.S.D.C. Southern District of Texas - Brownsville Division is electronic.
Oct 30 2017	Argued. For petitioner: Lee Kovarsky, Baltimore, Md. (Appointed by this Court.) For respondent: Scott A. Keller, Solicitor General of Texas, Austin, Tex.
Mar 21 2018	Judgment VACATED and case REMANDED. Alito, J., delivered the **opinion** for a unanimous Court. Sotomayor, J., filed a concurring opinion, in which Ginsburg, J., joined.

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RECORD AND BRIEFS

16-6795

NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
NOV 07 2016
OFFICE OF THE CLERK

CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED (CAPITAL CASE)

While Carlos Ayestas' federal habeas proceeding was pending, the Harris County District Attorney's Office ("HCDA") accidentally disclosed a document memorializing the basis of its charging decision. The author of that HCDA charging memo had provided as one of two typewritten reasons for seeking the death penalty: "THE DEFENDANT IS NOT A CITIZEN." The lower federal courts have denied the routine stay-and-amendment procedure necessary to exhaust the claims associated with the HCDA memo in state court.

The lower courts have also denied Mr. Ayestas' motion, under 18 U.S.C. § 3599, for "investigative, expert, [and] other services" that were "reasonably necessary" to develop facts associated with a separate Sixth Amendment ineffective-assistance-of-counsel ("IAC") claim that had been forfeited by his state habeas lawyer. The Fifth Circuit interprets "reasonably necessary" to require an inmate to show "substantial need," an interpretation of § 3599(f) that forms an express circuit split with other federal courts of appeal. Through the substantial-need standard, the Fifth Circuit withholds expert and investigative assistance unless inmates are able to carry the burden of proof on the underlying claim at the time they make the § 3599(f) motion itself.

This case therefore presents the following questions:

1. **Whether reasonable jurists could disagree that, by anticipatorily applying a procedural default not actually grounded in state law, a district court abused its discretion when it refused a routine stay and amendment necessary to exhaust claims associated with newly discovered evidence revealing overt discrimination in the prosecution's decision to seek the death penalty.**

2. **Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an IAC claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made.**

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Carlos Manuel Ayestas, was the Petitioner before the United States District Court for the Southern District of Texas, as well as the Applicant and the Appellant before the United States United States Court of Appeals for the Fifth Circuit. Mr. Ayestas is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director and her predecessors were the Respondents before the United States District Court for the Southern of Texas, as well as the Respondent and the Appellee before the United States Court of Appeals for the Fifth Circuit.

Mr. Ayestas asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED (CAPITAL CASE) i

PARTIES TO THE PROCEEDINGS BELOW ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. Trial and Direct Review 3

B. State Habeas Proceedings 7

C. Federal Habeas Proceedings 11

1. Pre-Remand Proceedings 11

2. Post-Remand Proceedings 13

REASONS FOR GRANTING RELIEF 17

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER REASONABLE JURISTS COULD DISAGREE ON THE APPROPRIATENESS OF THE *RHINES* STAY 17

A. The Fifth Circuit Determined That Trial Counsel Was At Fault For Failing To Obtain Core HCDA Work Product. 18

B. Reasonable Jurists Can Debate Whether Mr. Ayestas Was Entitled To A *Rhines* Stay 19

1. The underlying constitutional claims have merit. 20

2. Trial counsel was not at fault for failing to obtain the Siegler Memo. 22

C. The "Mandate Rule" Does Not Foreclose Consideration Of The Siegler Memo Claims. 25

TABLE OF CONTENTS (cont.)

Page

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT OVER THE FIFTH CIRCUIT'S "SUBSTANTIAL NEED" TEST FOR FACT DEVELOPMENT. 26

A. The Fifth Circuit Used Its Substantial-Need Rule To Deny Experts And Investigators To Mr. Ayestas, An IAC Claimant Lacking Any Prior Opportunity To Develop Facts. 27

B. *Ayestas* Deepens A Split With The Fourth And Sixth Circuits, The Latter of Which Expressly Rejects The Substantial-Need Rule. 33

C. Mr. Ayestas' § 3599(f) Motion For Resources Should Have Been Granted. 37

CONCLUSION AND PRAYER FOR RELIEF 40

CERTIFICATE OF SERVICE

INDEX OF APPENDICES

Appendix A – *Ayestas v. Stephens*, 817 F.3d 888 (5th Cir. 2016)

Appendix B – *Ayestas v. Stephens*, 826 F.3d 214 (5th Cir. 2016) (mem.)

Appendix C – *Ayestas v. Stephens*, 2014 WL 6606498 (S.D. Tex. Nov. 18, 2014) (No. 51)

Appendix D – Order denying Mr. Ayestas' Mot. for Leave to Amend his Pet. For Writ of Habeas Corpus, and his Motion to Stay and Abey Proceedings, *Ayestas v. Stephens*, No. 4:09-cv-02999 (S.D. Tex. Feb. 17, 2015) (No. 63)

Appendix E – Mem. Op. and Order denying Mr. Ayestas' Rule 59(e) Mot. to Alter or Amend J., *Ayestas v. Stephens*, No. 4:09-cv-02999 (S.D. Tex. Apr. 1, 2015) (No. 64)

Appendix F – Harris County District Attorney, Capital Murder Summary Internal Memorandum (Sept. 19, 1996)

Appendix G (SEALED) – Pet. Mot. for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f), *Ayestas v. Stephens*, No. 4:09-cv-02999 (S.D. Tex. Nov. 3, 2014) (No. 49)

TABLE OF AUTHORITIES

Page(s)

STATUTES

18 U.S.C. § 3599 (a)(2) 3

18 U.S.C. § 3599 (f) ..... passim

21 U.S.C. § 848(q)(9) 27

21 U.S.C. § 848(q)(4)(B) 27

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 2241 2

28 U.S.C. § 2253 2

28 U.S.C. § 2253(c) 3, 19

28 U.S.C. § 2254 2

28 U.S.C. § 2254(b) 18

Tex. Code Crim. Proc. art. 11.071 § 4(a) 7

Tex. Code Crim. Proc. art. 11.071 § 5(a)(1) 19, 22, 24

Tex. Code Crim. Proc. art. 11.071 § 5(e) 22

Tex. Code Crim. Proc. art. 37.071, § 2(b)(1) 7

Tex. Code Crim. Proc. art. 37.071, § 2(e) 7

Tex. Code Crim. Proc. art. 37071, § 2(g) 7

CASES

Ayestas v. Stephens,
817 F.3d 888 (5th Cir. 2016) 1

TABLE OF AUTHORITIES (cont.)

Page

Ayestas v. Stephens,
826 F.3d 214 (5th Cir. 2016) (mem.) 1

Ayestas v. Stephens,
2014 WL 6606498 (S.D. Tex. Nov. 18, 2014) (No. 51) 1-2

Ayestas v. Thaler,
133 S. Ct. 2764 (2013) (mem.) 13, 28

Beard v. Kindler,
558 U.S. 53 (2009) 24

Bordenkircher v. Hayes,
434 U.S. 357 (1978) 21

Brady v. Maryland,
373 U.S. 83 (1963) 3, 4

Burris v. Parke,
130 F.3d 782 (7th Cir. 1997) 37

Clark v. Jeter,
486 U.S. 456 (1988) 21

Coleman v. Thompson,
501 U.S. 722 (1991) 25

Cooper v. Calderon,
255 F.3d 1104 (9th Cir. 2001) 36

Crutsinger v. Stephens,
576 F. App'x 422 (5th Cir. 2014) 32

State ex rel. Curry v. Walker,
873 S.W.2d 379 (Tex. 1994) 23

Davis v. Ayala,
135 S. Ct. 2187 (2015) 20

TABLE OF AUTHORITIES (cont.)

Page

DeGarmo v. Texas,
106 S. Ct. 337 (1985) (mem.) 21

Foley v. White,
2016 WL 4487994 (6th Cir. Aug. 26, 2016) 35

Foster v. Chatman,
136 S. Ct. 1737 (2016) 22

Garcia v. Peeples,
734 S.W.2d 343 (Tex. 1987) 24

Gary v. Warden, Georgia Diagnostic Prison,
686 F.3d 1261 (11th Cir. 2012) 34

Harris v. Nelson,
394 U.S. 286 (1969) 34

Henderson v. Stadler,
407 F.3d 351 (5th Cir. 2005) 25

Hickman v. Taylor,
329 U.S. 495 (1947) 23

Jackson v. Sullivan,
987 F.2d 772 (5th Cir. 1993) 26

Lee v. *Humphrey*,
2013 WL 4482461 (S.D. Ga. Aug. 20, 2013) 34

Ex parte Lewis,
No. 1428102 (351st Tex. D. Ct. (Harris County) Sept. 28, 2016) 23

Mamou v. Stephens,
2014 WL 4274088 (S.D. Tex. Aug. 28, 2014) 33

Martinez v. Ryan,
132 S. Ct. 1309 (2012) ..... passim

Matthews v. White,
807 F.3d 756 (6th Cir. 2015) 34, 35

TABLE OF AUTHORITIES (cont.)

Page

McClesky v. Kemp,
481 U.S. 279 (1987) 22

McFarland v. Scott,
512 U.S. 849 (1994) 37, 38

National Bank Co. v. Brotherton,
851 S.W.2d 193 (Tex. 1993) 23

National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Valdez,
863 S.W.2d 458 (Tex. 1993) 23

Ochoa v. Stephens,
No. 09-cv-2277 (N.D. Tex. Oct. 15, 2014) 33

Oyler v. Boles,
368 U.S. 448 (1962) 21

Quern v. Jordan,
440 U.S. 332 (1979) 26

Rhines v. Weber,
544 U.S. 269 (2005) ..... passim

Riley v. Dretke,
362 F.3d 302 (5th Cir. 2004) 27

Rojem v. Gibson,
245 F.3d 1130 (10th Cir. 2001) 35

Rompilla v. Beard,
545 U.S. 374 (2005) 24

Rose v. Lundy,
455 U.S. 509 (1982) 18

Rose v. Mitchell,
443 U.S. 545 (1979) 21

TABLE OF AUTHORITIES (cont.)

Page

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 25

Sells v. Stephens,
536 F. App'x 483 (5th Cir. 2013) 33

Slack v. McDaniel,
529 U.S. 473 (2000) 19

Ex Parte Temple,
178th District Court, No. 1008673-A (July 8, 2015) 3

Thompson v. Stephens,
No. 13-cv-1900 (S.D. Tex. May 2, 2014) 33

Tong v. Stephens,
No. 4:10-cv-2355 (S.D. Tex. Sept. 22, 2014) 33

Trevino v. Thaler,
133 S. Ct. 1911 (2013) ..... passim

Trimble v. Gordon,
430 U.S. 762 (1977) 21

United States v. Armstrong,
517 U.S. 456 (1996) 22

United States v. Batchelder,
442 U.S. 114 (1979) 21

United States v. Brandon,
17 F.3d 409 (1st Cir. 1994) 37

United States v. Parker,
4 F. App'x 111 (2d Cir. 2001) 36

United States v. Pitts,
346 F. App'x 839 (3rd Cir. 2009) 36

Untied States v. Thurmon,
413 F.3d 752 (8th Cir. 2005) 36

TABLE OF AUTHORITIES (cont.)

Page

Ward v. Stephens,
777 F.3d 250 (5th Cir. 2015) 32

Wellons v. Hall,
558 U.S. 220 (2010) 40

Wiggins v. Smith,
539 U.S. 510 (2003) ..... passim

Wilkins v. Stephens,
560 F. App'x 299 (5th Cir. 2014) 32

Wilson v. Humphrey,
2011 WL 2709696 (M.D. Ga. July 12, 2011) 34

Wright v. Angelone,
151 F.3d 151 (4th Cir. 1998) 35

CONSTITUTIONS AND RULES

U.S. CONST. amend. XI 2

U.S. CONST. amend. XIII 2

U.S. CONST. amend. XIV 2

FED. R. CIV. P. 26, Advisory Comm. Notes, 1970 Amendment 23

FED. R. CIV. P. 59(e) 15

OTHER AUTHORITIES

Brian Rogers, "Attorneys Attack Former Prosecutor in Another High-Profile Murder Trial," HOUSTON CHRON., July 19, 2015 4

Harris County District Attorney, Capital Murder Summary Internal Memorandum (Sept. 19, 1995) 3-4

PETITION FOR A WRIT OF CERTIORARI

Carlos Manuel Ayestas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On March 22, 2016, the U.S. Court of Appeals for the Fifth Circuit issued an Opinion refusing to certify appeals from district court orders denying Sixth Amendment ineffective-assistance-of-counsel ("IAC") relief and a stay necessary to exhaust claims discovered during the pendency of federal proceedings. It also affirmed a district court order denying 3599(f) fact-development resources. The March 22, 2016 Opinion is reported as *Ayestas v. Stephens*, 817 F.3d 888 (5th Cir. 2016), and is attached as Appendix A. On June 10, 2016, the Fifth Circuit issued an Opinion Order in which it revised and supplemented the reasoning in its initial Opinion. The June 10, 2016 Opinion Order is reported as *Ayestas v. Stephens*, 826 F.3d 214 (5th Cir. 2016) (mem.), and is attached as Appendix B.[1]

On November 18, 2014, the district court issued a Memorandum Opinion and Order denying on remand Mr. Ayestas' petition for writ of habeas corpus, and denying Mr. Ayestas' Motion for Funding for Ancillary Services. The November 18, 2014 opinion is unpublished and unofficially reported as *Ayestas v. Stephens*, 2014 WL

[1] Mr. Ayestas' petition for certiorari was originally due on September 8, 2016. On August 10, Mr. Ayestas was granted an extension of forty-six days, making the new deadline October 24. Application (16A130) granted by Justice Thomas Extending Time to File Until Oct. 24, *Ayestas v. Davis*, No. 15-70015 (Aug. 10, 2016). On October 19, Mr. Ayestas was granted an additional fourteen-day extension, pushing the

6606498 (S.D. Tex. Nov. 18, 2014) (No. 51), and is attached as Appendix C. On February 17, 2015, the district court issued an Order denying Mr. Ayestas' Motion for Leave to Amend his Petition for Writ of Habeas Corpus, and his Motion to Stay and Abey Proceedings to permit exhaustion. The February 17, 2015 Order is attached as Appendix D. On April 1, 2015, the district court issued a Memorandum Opinion and Order denying Mr. Ayestas' Rule 59(e) Motion to Alter or Amend Judgment. The April 1, 2015 Opinion and Order is attached as Appendix E.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 & 2254. Under 28 U.S.C. § 1291, the Fifth Circuit had jurisdiction over issues arising under the Criminal Justice Act ("CJA"), codified at 18 U.S.C. § 3599. Under 28 U.S.C. § 2253, the Fifth Circuit had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability ("COA"). This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1), over all issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 & 2253, and under 18 U.S.C. § 3599.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

U.S. Constitution, Amendment VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Constitution, Amendment XIV provides: "No state shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

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deadline to November 7. Application (16A130) granted by Justice Thomas Extending Time to File Until Nov. 7, *Ayestas v. Davis*, No. 15-70015 (Aug. 10, 2016).

* * * *

18 U.S.C. § 3599 provides in pertinent part:

(a)(2) In any post conviction proceeding * * * seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain * * * investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f). * * *

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor * * *.

* * * *

28 U.S.C. § 2253(c) provides: "[a] certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right."

* * * * *

STATEMENT OF THE CASE

A. Trial and Direct Review

Carlos Manuel Ayestas was arrested on September 21, 1995 for killing Santiaga Paneque in the course of a robbery.[2] On September 19, before the arrest, now-embattled Harris County Assistant District Attorney ("HCDA") Kelly Siegler wrote an internal office memorandum entitled "Capital Murder Summary."[3] The "Siegler

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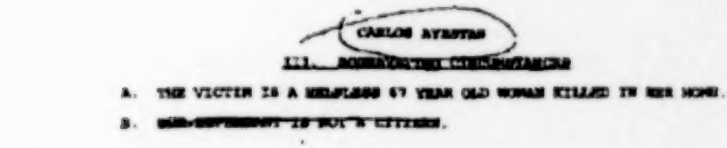
[2] Mr. Ayestas is also known as Denys Humberto Zelaya Corea, and has been identified as such in many of his previous filings.

[3] A Texas court recently recognized prosecutorial misconduct and granted a new trial in a case where Ms. Siegler was lead counsel. That court cited 36 instances of prosecutorial misconduct by the HCDA, and Ms. Siegler's secreting of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See* "Findings of Fact and Conclusions of Law," *Ex Parte David Mark Temple*, 178th District Court, No. 1008673-A (July 8, 2015). In the aftermath of *Temple*, scrutiny of Ms. Siegler

Memo" is attached as Appendix F. Ms. Siegler was the HCDA "Court Chief," which meant that she prepared memoranda on murders that could be charged capitally, and that served as sentencing recommendations to her superiors.

The Siegler Memo detailed the aggravating factors that might support an HCDA office decision to seek the death penalty. One of the two aggravating factors cited in favor of capitally charging Mr. Ayestas was his status as a foreign national:



App.F3.[4] HCDA supervisors adopted the recommendation and sought the death penalty.[5] Before the memo was discovered, someone drew a line through the reference to Mr. Ayestas' citizenship status. Nothing else is yet known about the mark.

On January 16, 1996, after Mr. Ayestas was arrested, the trial court appointed Diana Olvera as defense counsel. On February 15, 1996, she filed several pretrial motions, among them a request for the appointment of an investigator,

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has been renewed for withholding *Brady* evidence in a second Harris County capital case. *See* Brian Rogers, "Attorneys Attack Former Prosecutor in Another High-Profile Murder Trial," HOUSTON CHRON., July 19, 2015, *available at* http://www.houstonchronicle.com/news/houston-texas/houston/article/Attorneys-attack-Siegler-in-another-high-profile-6393907.php.

[4] The trial Reporter's Record is referred as "[volume number] RR [page]." The Clerk's Record is referred to as "CR [page]." The federal record on appeal is referred to as "USCA5.[page]."

[5] The recommendation was adopted by the Division Chief, Casey O'Brien, the Bureau Chief Kenn Henderson, and the elected District Attorney, John B. Holmes, Jr. USCA5.1142. Holmes wrote in the reasons for approving the capital prosecution at the bottom of the printed memo. USCA5.1142.

John Castillo. Trial counsel took no further action for the next 15 months. On June 3, 1997, 10 days before jury selection began, the appointment motion was granted.

Other than several meetings with Mr. Ayestas, Castillo's activity report reveals that he conducted little mitigation investigation. USCA5.878-80. Castillo took virtually no action until May 7, 1997, when he was told that the "case was set for trial" so he should "resume" investigation. USCA5.686. Castillo then reviewed records, prepared a client questionnaire, met with trial counsel, and drafted a letter to Mr. Ayestas' family. USCA5.878. Once appointed, he attended court hearings and met with Mr. Ayestas. USCA5.878-79. Castillo reported that he unsuccessfully attempted to contact Mr. Ayestas' family and some State witnesses. USCA5.879. Castillo spoke to Frank and Vilma Torres, two guilt phase witnesses. Castillo's record collection consisted of requests for Mr. Ayestas' California prison and immigration records, and criminal history searches on some State witnesses.

Castillo prepared an investigation report, compiled mainly from Mr. Ayestas' answers to the questionnaire, which revealed information relevant to Mr. Ayestas' mental health and history of substance abuse. Mr. Ayestas recounted multiple head traumas, including: a blow while playing soccer as an adolescent; a motorcycle accident in which he was not wearing a helmet, which continued to cause headaches; and damage from a car accident in Houston. USCA5.687-88. Mr. Ayestas reported that he started drinking alcohol when he was 16 years old, and that he did cocaine at least once a week. His cocaine use thereafter escalated, as he slipped into addiction. Finally, Mr. Ayestas provided names and addresses of people who knew him in

Houston. USCA5. 687-88. Trial counsel failed to follow up on any of these leads. An inventory of trial counsel's file prepared during state habeas proceedings reveals no notes or memoranda of interviews, prospective witness lists, memoranda of investigative objectives, or other items indicative of an investigation. USCA5.874-76.

During the punishment phase, the State presented Mr. Ayestas as a habitual criminal whose offense devastated others' lives. The State presented victim impact testimony from the victim's son, 21 RR 183-86, and evidence of extraneous offenses. 21 RR 93-95, 101-104, 136-39; 23 RR State's Ex. 123A, 125, 126 129. Mr. Ayestas' entire punishment phase defense consisted of three positive assessment letters from his prison English teacher. 21 RR 190-91. The State told the jury that "[m]aking steps to learn a second language does not lessen the moral blameworthiness for the enormity of his crime and his life of crime." 21 RR 232. Trial counsel also attempted to introduce two documents demonstrating Mr. Ayestas' clean Honduran criminal record and his Honduran work permit, but could not do so because their subject was identified as Denys Humberto Zelaya Cores. 21 RR 193-94. Trial counsel had not prepared any evidence showing this was Mr. Ayestas' real name. 21 RR 194-96; *see supra* note 2. During closing arguments, the State highlighted the absence of mitigation. 21 RR 232 ("Does he have anything in there that would lead you to conclude there is some type of mitigation, anything at all? *There is no drug problem. There's no health problem. There is no alcohol problem.*") (emphasis added).

Mr. Ayestas was convicted on July 9, 1997, and was sentenced to death the next day. 21 RR 238-42. A Texas jury must answer two "special issues" before im-

posing a capital sentence. First, the jury determined that Mr. Ayestas would be a future danger. Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). Second, presented with little evidence, it determined that there were no mitigating circumstances sufficient to spare Mr. Ayestas' life. TEX. CODE CRIM. PROC. art. 37.071, § 2(e). If a single juror had dissented on either question, no death sentence could have been imposed. Tex. Code Crim. Proc. art. 37.071, § 2(g). The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and sentence on November 4, 1998. *Ayestas v. State*, No. AP-72,928 (Tex. Crim. App. 1998). Mr. Ayestas did not seek certiorari review.

B. State Habeas Proceedings

Texas law required Mr. Ayestas to file his first state habeas application while his conviction was pending on direct review. *See* Tex. Code Crim. Proc. art. 11.071 § 4(a). The TCCA appointed Gary Hart to represent Mr. Ayestas on January 19, 1998. Hart and a co-worker, Robin Norris, had recently left jobs as TCCA staff attorneys, forming a partnership and taking five capital habeas cases each. USCA5. 707-12. On February 10, 1998, Hart retained mitigation specialist Tena Francis to work this case. Francis had worked with Hart and Norris on a number of other cases; she knew that they responded to being overextended and underpaid "by limiting investigation and by raising mostly record-based claims." USCA5.702. Her experience was that they were "not interested in investigating mitigation evidence or in fully developing evidence related to the punishment phase." USCA5.702. In this case, she believed Hart was not "as concerned about conducting a comprehensive mitigation investigation," and he did not "seek adequate funding for them." USCA5.702.

Francis prepared an investigation plan, designed to help Hart secure court funding. USCA5.699, 703, 715-21. Francis notified Hart that the jury had heard virtually no mitigation evidence concerning Mr. Ayestas' background, advising him:

> The jury heard nothing about this defendant's family, realcharacter, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological traumas * * *. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history of the client.

USCA5.720. She told Hart that an investigation required document collection and witness interviews of friends outside the Ayestas family, and that it would cover Honduras, Mexico, California, and Houston. USCA5.703. She emphasized that Hart should investigate comprehensively Ayestas' history of addiction and mental health. USCA5.703-04. She believed substance abuse could have affected Mr. Ayestas' brain and impacted his ability to regulate his behavior, USCA5.704, and knew that it could either activate mental illness or represent a means of self-medication.

Hart clearly understood that addiction was relevant evidence ignored at sentencing, as his hand-written notes state: "Ayestas' drinking and/or drug consumption as a possible mitigating fact. How could this have been developed at trial?" USCA5.768. Francis further advised counsel that a mitigation investigation would account for "mental health [and] possible mental illness," USCA5.720. Hart, however, did not follow his investigators' advice. In particular, he did not investigate Mr. Ayestas' mental health issues or his history of addiction. In accordance with counsel's instructions, there was no investigation into the mitigation topics that Francis identified in her investigation plan. USCA5.699-700.

Hart himself undertook the mitigation investigation. He ignored the expert plan, and interviewed only three witnesses: Mr. Ayestas' mother, Zoila, and his two sisters, Blanca and Xiomara. USCA5.723, 750, 752-53. Hart learned that Mr. Ayestas was born and grew up in Honduras, that he came from a stable middle class background, and that his home life was loving and supportive. USCA5.804-27. However, when Mr. Ayestas was 18 years old, he left for the United States without telling his immediate family, who learned little more about his travels. The first red flag was when the family learned that eventual co-defendant Frederico Zaldivar was trailing and corrupting Mr. Ayestas. After those interviews, state habeas counsel discontinued investigation. He sought to interview no additional witnesses in Honduras, and did not investigate in California or Mexico—despite knowing that Mr. Ayestas spent significant time there. He did little to investigate the circumstances of Mr. Ayestas' life in Houston, leading up to the crime; all of his investigation focused on the circumstances surrounding Mr. Ayestas' arrest in Louisiana.

On December 9, 1998, Hart and Norris filed Mr. Ayestas' application for state habeas relief. The application included a Sixth Amendment ineffective-assistance-of-counsel ("IAC") claim that trial counsel failed to secure testimony of Honduran witnesses as to "good character traits, positive upbringing, good scholastic record, and lack of juvenile or criminal record while growing up in Honduras." USCA5.5270, 5294-5301. The application mentioned neither mental illness nor substance abuse, and omitted an IAC claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), for unreasonably narrowing the sentencing investigation ("*Wiggins* claim").

In responding to the IAC claim, the State included an affidavit from trial counsel. USCA5.5515-19. Trial counsel asserted that Mr. Ayestas instructed the defense team not to contact his family because of problems in Honduras. USCA5.5516-17. According to trial counsel, Mr. Ayestas did not relent until after jury selection had concluded. USCA5.5517. Trial counsel reported that the family could not come to the United States to testify and that Mr. Ayestas' mother appeared unconcerned about her son's situation. USCA5.5517.

As state habeas proceedings progressed, Mr. Ayestas' mental health severely deteriorated. In 2001, Mr. Ayestas had a serious psychotic episode. USCA5.770-74. Mr. Ayestas' TDCJ psychiatrist thereafter diagnosed him with schizophrenia, undifferentiated type. USCA5.772. The psychologist that assessed Mr. Ayestas at Hart's request informed Hart of "concerns regarding Mr. Ayestas' psychological pattern" and stated, "clearly his mental status needs to be evaluated closely." USCA5.776. Even as state habeas proceedings remained pending, Hart failed to supplement the state application with any mental health evidence. In 2006, citing plans to return to the TCCA as a staff attorney, Hart sought to withdraw and substitute Norris as Mr. Ayestas' counsel. USCA5.5689-91. Mr. Ayestas refused to consent to Norris' representation, USCA5.5695, and so the TCCA appointed Kurt Wentz. USCA5.5696.

Ultimately, the state habeas court concluded: "Trial counsel cannot be considered ineffective based on [Mr. Ayestas'] family not attending the * * * trial, in light of [Mr. Ayestas'] numerous, initial assertions that he did not want his family contacted and in light of trial counsel's extensive efforts to attempt to secure the

presence of [Mr. Ayestas'] family from Honduras after [Mr. Ayestas] changed his mind." USCA5.5933. The TCCA adopted the findings and denied relief. *Ex parte Ayestas*, No. WR-75-4409-A (Tex. Crim. App. 2008) (not designated for publication).

C. Federal Habeas Proceedings

1. Pre-Remand Proceedings

With new counsel, Mr. Ayestas filed a federal habeas petition. USCA5.8-68. Based on a preliminary investigation, he included a *Wiggins* claim: that trial counsel unreasonably narrowed the sentencing investigation after encountering obvious red flags for mitigation. Among other things, he averred that, had trial counsel pursued clear indicators of mental health problems and substance abuse, there was a reasonable probability that the sentencing jury would have spared his life.

Mr. Ayestas argued that a sufficient mitigation investigation would have revealed readily "available and abundant" mitigation, including evidence about his upbringing and addiction, and that he suffered from early-stage schizophrenia and other mental illness. USCA5.14-15, 28-30. In new affidavit, family members Blanca Ayestas, Xiomara Ayestas, and Zoila Corea explained their interactions with trial and state habeas counsel, and elaborated on evidence that prior counsel never asked them to provide. TDCJ medical records obtained by federal habeas counsel revealed Mr. Ayestas' chronic mental conditions, including schizophrenia and psychosis—conditions that resulted in visual and auditory hallucinations, and that required multiple psychotropic medications. USCA5.28-30; 770-74. The records further detailed Mr. Ayestas fourteen-year history of alcohol abuse. USCA5.30.

In declarations attached to the federal petition, Mr. Ayestas' sister Blanca Keller (nèe Ayestas) related that state habeas counsel interviewed her and Mr. Ayestas' mother Zoila Corea together, and sought only information concerning Mr. Ayestas' good character. USCA5.855-63. Blanca explained that, had she been asked, she could have told state habeas counsel about Mr. Ayestas' "struggles" in Honduras, including the fact that he had three children by the time he was 17 years old. USCA5.862. She also disclosed that he was kidnapped in Mexico during a trip to the United States, and held captive until Mr. Ayestas' father paid a ransom six months later. USCA5.862. She identified numerous witnesses who could have given helpful favorable information about Mr. Ayestas, had she ever been asked. USCA5.863.

During the federal habeas investigation, Mr. Ayestas' sister Xiomara Ayestas and his mother Zoila Corea similarly provided information about their family's dysfunction. USCA5.846-53 (Xiomara Ayestas Aff.); 865-72 (Zoila Corea Aff.). Ms. Corea was 15 and Mr. Ayestas' father was 35 when the two met. USCA5.869. Mr. Ayestas' father never married his mother, and he had 22 children with a number of different women. USCA5.869. He visited his other families for two or three days at a time, and maintained a separate home. USCA5.852, 869. Xiomara characterized her father as extremely strict, requiring "absolute respect," and recited an episode in which he shot their neighbor to end a feud over a dog. USCA5.852. After the shooting, Mr. Ayestas' father never returned to Ms. Corea's house. USCA5.852.

The federal habeas investigation revealed that, though Mr. Ayestas had been a polite, studious child, when he was 16 years old, he began to change. USCA5.870.

He started staying out late and drinking alcohol. USCA5.870. He fathered a child with a woman who was older than he was. USCA5.870. He also stopped going to school. USCA5.870. When he was 18 years old, he told his mother that he was going to Guatemala, but he really went to the United States. USCA5.871. Xiomara also confirmed that Mr. Ayestas had been abducted in Mexico and held for ransom. USCA5.852. Finally, she stated that there were numerous people in Honduras, other than Mr. Ayestas' family, who could have provided information about Mr. Ayestas' upbringing. USCA5.852-53.

In her answer, the Director contended that the *Wiggins* claim was procedurally defaulted. USCA5.101-04. The district court agreed and denied relief. USCA5.502-07. On February 22, 2012, it refused a COA, holding that the "errors by habeas counsel cannot provide cause for a procedural default." USCA5.617. Shortly after the district court ruling, this Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), holding that state inmates may revive otherwise defaulted IAC claims if they were defaulted because state habeas counsel was deficient. *See* 132 S. Ct. at 1320. The following term, this Court decided *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), holding that *Martinez* applied in favor of Texas inmates. *See* 133 S. Ct. at 1921. On June 3, 2013, this Court granted Mr. Ayestas' petition for writ of certiorari, vacated the Fifth Circuit judgment, and remanded the case to the Fifth Circuit. *Ayestas v. Thaler*, 133 S. Ct. 2764 (2013) (mem.). On January 30, 2014, the Fifth Circuit remanded the case to the district court. USCA5.624-26.

2. Post-Remand Proceedings

With *Martinez* and *Trevino* establishing that Hart's performance might excuse default of the *Wiggins* claim, Mr. Ayestas sought fact development necessary to prove the excuse. He moved for investigation and expert assistance under 18 U.S.C. § 3599(f). USCA5.662-66. On November 3, 2014, he filed an *ex parte*, sealed motion under 18 U.S.C. § 3599(f) seeking authorization for a mitigation specialist to conduct the comprehensive mitigation investigation that trial and state habeas counsel failed to conduct. The § 3599(f) Motion is attached under seal as Appendix G.

On November 18, 2014, the district court denied § 3599(f) resources to factually develop the *Wiggins* claim, denied the claim on the merits, and declined to certify an appeal. App.C16. In denying and refusing to certify the claim itself, the district court held (1) that trial counsel could not have been deficient because Mr. Ayestas had at one point instructed her not to interview family members (App.C10), and (2) that his pleading did not attach records of mental health and substance abuse created at the time of trial. (App.C11). In withholding § 3599(f) resources, the district court invoked the Fifth Circuit rule that such resources were unavailable unless there was a "substantial need for investigative or expert assistance." App.C13 (internal quotation marks and citations omitted). The district court explained that there was no substantial need because he could not carry the ultimate burden of proof at that time: "Ayestas fails to *demonstrate* that trial counsel was deficient, that [he could satisfy the IAC prejudice prong], or that his state habeas counsel was ineffective." App.C14 (emphasis added).

On December 16, 2014, Mr. Ayestas filed a timely post-judgment motion under Federal Rule of Civil Procedure ("FRCP") 59(e). USCA5.969. On December 22, counsel for Mr. Ayestas reviewed portions of the HCDA file at the HCDA office. During that review, counsel discovered the Siegler Memo—work product inadvertently left in the HCDA file—which gave rise to claims under the Eighth and Fourteenth Amendments ("Siegler Memo claims"). As explained above, the Siegler Memo *expressly* gave Mr. Ayestas' status as a foreign national as one of two reasons for seeking the death penalty. App.F3. On January 9, 2015, while Mr. Ayestas' FRCP 59(e) motion was pending, he moved, under FRCP 15, to amend his petition and add the Siegler Memo claims. USCA5.1132.[6]

Mr. Ayestas also moved to stay and hold his federal proceeding in abeyance so that he could exhaust the Siegler Memo claims in state court. USCA5.1152. Under *Rhines v. Weber*, 544 U.S. 269 (2005), a stay-and-abeyance order ("*Rhines* stay") is the standard practice for pausing a federal proceeding, allowing an inmate to exhaust a newly discovered claim and then add it via FRCP 15 amendment. *See id.* at 278. On February 17, 2015, the district court denied both the FRCP 15 motion and the *Rhines* stay. App.D6. On April 1, the district court denied the FRCP 59 motion and a COA. App.E4.

In the Fifth Circuit, Mr. Ayestas requested a COA on the orders denying the *Rhines* stay and the amendment, and he appealed the order denying § 3599(f) serv-

[6] On January 14, 2015, Mr. Ayestas filed a "Supplement to Petitioner's Rule 59 Motion to Alter or Amend The Judgment Urging Court To Grant Leave to Amend Original Petition for Writ of Habeas Corpus." USCA5.1143.

ices.[7] On March 22, 2016, the appeals court denied all relief. It held that a *Rhines* stay was inappropriate because, were Mr. Ayestas to present the Siegler Memo claims to the TCCA, the TCCA would have treated them as procedurally defective under the Texas post-conviction statute. App. A14-A17. It also held there was no permissible amendment for a *Rhines* stay to facilitate because such relief was outside the scope of its post-*Trevino* remand order. App.A13-A14.

On the § 3599(f) issue, the Fifth Circuit invoked the Fifth Circuit rule that the investigative services to develop a claim are "reasonably necessary" within the statutory provision only if there is a "substantial need" for them. App.A7-A8. It then performed the substantial-need analysis by declaring the undeveloped *Wiggins* claim meritless, and therefore unworthy of investigation. The Fifth Circuit twice justified its determination of meritlessness by reference to trial counsel's effectiveness in having Mr. Ayestas examined by a psychologist. App.A10, A11. As to prejudice, it held: "[W]e find it at best to be conceivable, *but not substantially likely*, that the outcome may have been different." App.A11 (emphasis added).

Upon the submission of rehearing petitions, the Fifth Circuit revised its opinion. *See* App.B1-B2. With respect to the *Rhines* stay, the Fifth Circuit clarified that it denied relief because it determined that *trial counsel* was at fault for failing to obtain the Siegler Memo. App.B2. With respect to the § 3599(f) issue, it confessed that its prior deficiency holding had erroneously assumed that trial counsel submit-

[7] The Fifth Circuit seemed to believe that Mr. Ayestas applied for a COA on the underlying IAC claim that he was denied resources to develop, App.A12-13, but he sought no such relief.

ted Mr. Ayestas for psychiatric evaluation (trial counsel did not), but its ultimate determination remained unchanged. Specifically, it affirmed its prejudice determination: that the *Wiggins* claim was unworthy of fact development because a different sentencing result was not substantially likely. App.B2. This Petition follows.

REASONS FOR GRANTING RELIEF

The Fifth Circuit gratuitously imposed procedural hurdles to the development of meritorious claims. It prevented exhaustion of the Siegler Memo claims by anticipatorily applying a procedural-default bar, faulting trial counsel for not obtaining core prosecution work product. The Fifth Circuit also refused expert and investigative services for the *Wiggins* claim, applying a circular substantial-need framework under which courts withhold § 3599(*f*) resources when a movant cannot carry the ultimate burden of proof on the underlying claim at the time the motion is made. The substantial-need holding deepens an existing split with the Sixth Circuit. This Court should grant certiorari to stop the Fifth Circuit from short-circuiting the Siegler Memo and *Wiggins* litigation.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER REASONABLE JURISTS COULD DISAGREE ON THE APPROPRIATENESS OF THE *RHINES* STAY.

The Siegler Memo captures crucial HCDA personnel recommending that Mr. Ayestas be capitally charged because he was "not a citizen." Without further discovery, nothing else can be known about the memo, the broader significance of foreign-national status in HCDA charging practice, or whether HCDA personnel were targeting *Latino* defendants. The lower courts, however, denied the routine process for

dealing with such newly discovered evidence: a *Rhines* stay to exhaust the Siegler Memo claims and the FRCP 15 amendment necessary to add them to the pleadings.

A. The Fifth Circuit Determined That Trial Counsel Was At Fault For Failing To Obtain Core HCDA Work Product.

Before a federal court may entertain a state inmate's claim, it must be exhausted in state court. *See* 28 U.S.C. § 2254(b). Federal courts must dismiss "mixed petitions"—habeas complaints containing both exhausted and unexhausted claims—without prejudice. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982). Federal law provides a mechanism for staying the proceeding—a *Rhines* stay—while the state inmate presents the unexhausted claims to state courts. *See Rhines v. Weber*, 544 U.S. 269, 275-76 (2005). *Rhines* stays are particularly important in cases like this one, when a new (and unexhausted) claim is discovered while the federal petition remains pending. A *Rhines* stay is appropriate where there is "good cause" and the claims are not "plainly meritless." *Id.* at 277. The district court denied a *Rhines* stay, and the Fifth Circuit refused to certify an appeal on the grounds that the Siegler Memo claims were (in some procedural sense) "meritless." App.A14.[8]

The Fifth Circuit deemed the Siegler Memo claims "meritless" by anticipatorily applying a procedural default; the Fifth Circuit believed that Texas courts would refuse to entertain the claims. App.A15-17. In declaring default, the Fifth Circuit analyzed the applicable Texas capital habeas provision, which reads:

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[8] The Fifth Circuit opinion includes a passage stating that the Siegler Memo claims were not meritorious because "Ayestas's trial counsel and his state habeas attorneys were not ineffective." App.A17. This passage appears to be some sort of scrivener's error; the Siegler Memo claims are not IAC challenges.

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application * * * .

Tex. Code. Crim. Proc. art. 11.071 § 5(a)(1). Subsection 5(e) then defines factual availability under § 5(a)(1): "a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the reasonable diligence on or before that date."

The Fifth Circuit concluded that the TCCA would not entertain the Siegler Memo claims because "Ayestas's briefing in this court and in the district court never suggests he sought to examine the prosecution's file *prior* to the December 22 search that uncovered the memorandum." App. A15. In its supplemental opinion, the Fifth Circuit clarified that it was "not, though, referring to the diligence of federal habeas counsel in locating the memo. It was the diligence of Ayestas's trial counsel that we were describing." App.B2.

B. Reasonable Jurists Can Debate Whether Mr. Ayestas Was Entitled To A *Rhines* Stay.

28 U.S.C. § 2253(c)(2) provides that a COA should issue if an inmate "has made a substantial showing of the denial of a constitutional right." Under *Slack v. McDaniel*, 529 U.S. 473 (2000), an inmate may appeal an adverse "procedural" ruling if "jurists of reason would find it debatable whether the petition states a valid

claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478.

Mr. Ayestas meets the COA requirements. The Fifth Circuit nested its anticipatory default holding inside its *Rhines* disposition, although there was no need or justification for doing so. If the TCCA were to refuse to authorize litigation of the Siegler Memo claims, then the claims would be defaulted upon return to federal court, and an *actual* default could be imposed at that time. The Fifth Circuit's rationale for the *anticipatory* default holding—that trial counsel was at fault for failing to obtain the Siegler Memo—betrays a basic misunderstanding about the availability of core prosecution work product.

1. The underlying constitutional claims have merit.

To succeed in obtaining a *Rhines* stay, Mr. Ayestas must demonstrate that his claim is not "plainly meritless." *Rhines*, 544 U.S. at 269. The underlying conduct here is constitutionally egregious. The Siegler Memo was written by a former HCDA attorney who committed extensive prosecutorial misconduct in other cases, it expressly adverted to Mr. Ayestas' noncitizenship as a reason to capitalize the prosecution, and it was passed up the HCDA chain of command. State officials clearly discriminated in the charging decision, and the only question is how many.

Selective prosecution—by reference to race, nationality, alienage status, or ethnicity—erodes the basic credibility of American legal institutions. It "undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice." *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)

(referring to discrimination in the jury selection process). *Cf. Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

Though prosecutors enjoy broad charging discretion, "[s]electivity in the enforcement of criminal laws is * * * subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125 (1979). Factors such as "race or religion may play no part in [the state's] charging decision." *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978). Specifically, the Equal Protection clause bars a selective prosecution involving a suspect classification. *See Oyler v. Boles*, 368 U.S. 448, 456 (1962). In Equal Protection jurisprudence, "[c]lassifications based on race or national origin * * * are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (internal citations omitted). Discrimination on the basis of alienage is treated the same way as discrimination based on race or national origin. *See Trimble v. Gordon*, 430 U.S. 762, 780 (1977) ("In cases involving alienage, for example, [the Court] has concluded that such classifications are 'suspect' because, though not necessarily involving race or national origin, they are enough like the latter to warrant similar treatment."). Using impermissible criteria to selectively prosecute an offense, especially a capital crime, also implicates the Eighth Amendment. *See DeGarmo v. Texas*, 106 S. Ct. 337, 338-39 (1985) (mem.) (Breyer, J., dissenting from the denial of certiorari) ("[I]f the price of prosecutorial independence is the freedom to impose death in an arbitrary, freakish, or discriminatory manner, it is a price the Eighth Amendment will not tolerate.").

This case requires none of the caution associated with inferential discrimination claims based only on a pattern of outcomes. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) ("Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."). Nor does an entitlement to discovery depend on a statistical analysis of similarly situated defendants. *Compare United States v. Armstrong*, 517 U.S. 456, 469 (1996) (conditioning discovery on a showing that "the Government has failed to prosecute others who are similarly situated to the defendant"). Rather, the Siegler Memo is *direct* evidence of discrimination. Where an impermissible factor is explicitly cited as guiding the state's decision-making, it must be taken at face value. *See Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (rejecting attempts to neutralize clear references to race of potential jurors in file).

2. Trial counsel was not at fault for failing to obtain the Siegler Memo.

The Fifth Circuit denied the *Rhines* stay because it anticipated that Texas would not entertain the claim. App.A17. As explained above, the Texas statute *does* require courts to entertain claims based on newly available facts, and facts are newly available "if the factual basis was not ascertainable through the reasonable diligence on or before [the date of the initial application]." Tex. Code. Crim. Proc. art. 11.071 § 5(a) & 5(e). The Fifth Circuit held that the Siegler Memo claims were "factually available" when Mr. Ayestas filed his first state post-conviction application, reasoning that trial counsel was at fault for failing to obtain the memo. Neither legal authority nor common sense supports the notion that Mr. Ayestas was at

fault for failing to obtain sensitive prosecution work product in the middle of a capital trial. Even *after* trial concludes, the State has a long-standing policy of redacting work product from its files before allowing an inmate's legal team to review them. *See* Scott Durfee Aff., *Ex parte Lewis*, No. 1428102 (351st Tex. D. Ct. (Harris County) Sept. 28, 2016) (during capital habeas discovery, "[t]he privileged and confidential information in the State's file is held back and the remainder of the file is made available to the defense counsel for review").

The Siegler Memo was confidential intra-office communication that disclosed the prosecution's innermost thoughts about the case—and thereby meets the black-letter definition of privileged work product. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *see also* FRCP 26, Advisory Comm. Notes, 1970 Amendment (stating that the work product doctrine "protect[s] against disclosure of the mental impressions, conclusions, opinions or legal theories concerning the litigation of an attorney or other representative of a party"). Texas work-product rules parallel those used in federal courts, *see National Bank Co. v. Brotherton*, 851 S.W.2d 193, 202 (Tex. 1993), and cover documents in both civil and criminal proceedings, *see State ex rel. Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994). It offers particularly robust protection for office memoranda. *See National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993) ("An attorney's litigation file goes to the heart of [] privileged [work product]. The organization of the file * * * necessarily reveals the attorney's thought processes concerning the prosecution or

defense of the case."); *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987) (referring to "indexes, notes and memoranda" as "work product in every sense of the term").

The Supreme Court case that the Fifth Circuit cited was *Rompilla v. Beard*, 545 U.S. 374 (2005), which it characterized as holding that "counsel's failure to look at the 'readily available' prosecution file was deficient performance * * *." App.A15-A16. *Rompilla*, of course, was not about trial counsel's failure to obtain State work product in the *then-pending prosecution*, but counsel's failure to get a publicly available trial transcript from a *prior conviction*. *See Rompilla*, 545 U.S. at 384. The file in *Rompilla* "was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried." *Id.* The Siegler Memo, by contrast, was not a "public document" that was "readily available." It was sensitive work product that, in the very proceeding at issue, the State had refused to disclose after multiple requests. *See* USCA5.1411-18, 1437-38 (trial counsel's multiple motions for favorable or exculpatory material in the State's possession).

Even if Texas ultimately refused to entertain Siegler Memo claims, the Fifth Circuit's default ruling was *still* premature. First, only an "adequate and independent" procedural ground can trigger federal default. *See Beard v. Kindler*, 558 U.S. 53, 55 (2009). A procedural ground is not adequate if it is not "firmly established and regularly followed." *Id.* at 61 (citations and quotation marks omitted). If the TCCA had barred the Siegler Memo claims under art. 11.071 § 5(a)(1), then that ground would have been "inadequate" and posed no bar to merits review in federal court. Second, not all defaults preclude merits review. An inmate can excuse default

by demonstrating either "cause and prejudice" or a "miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Mr. Ayestas can argue that any erroneously-imposed default is excused—because, among other things, the express reference to his citizenship status as a reason for capitalizing the proceeding qualifies as a miscarriage of justice.

C. The "Mandate Rule" Does Not Foreclose Consideration Of The Siegler Memo Claims.

The Fifth Circuit also denied the *Rhines* stay on the ground that there was no amendment for it to facilitate, because adding the Siegler Memo claims would violate the "mandate rule" limiting a lower court's post-remand consideration to matters not excluded by the order of the higher court. App.A13. The Fifth Circuit's remand order in the prior appeal stated: "We REMAND to the district court to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*. We express no view on what decisions the district court should make on remand." App.A14. The Fifth Circuit then interpreted its prior remand order as instructing the district court to consider nothing other than defaulted IAC claims. App.A14. Citing the mandate rule in this appeal, the Fifth Circuit held that, by specifying questions to be decided on remand, its prior mandate implicitly limited that remand to those questions. App.A13 (quoting *Henderson v. Stadler*, 407 F.3d 351, 354 (5th Cir. 2005)).

The Fifth Circuit's proposition—that a remand order designating an issue limits the remand to consideration of that issue—is foreclosed by longstanding precedent. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895) ("The [lower]

court may consider and decide any matters left open by the mandate of [the higher] court."). The mandate rule bars remanded consideration only of issues or claims "previously determined" by the remanding court, and the receiving court "is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979); *see also Jackson v. Sullivan*, 987 F.2d 772 (5th Cir. 1993) ("If the mandate is silent as to an issue, this doctrine applies only if the appellate court decided the question by 'necessary implication.'") The Panel did not expressly resolve the Siegler Memo claims; nor did it resolve those claims "implicitly" or "necessarily." Far from "necessarily deciding" the Siegler Memo claims, the Panel necessarily *did not* decide them—because they were not included in the prior appeal.

* * *

When the State seeks the death penalty against a defendant because he is a noncitizen, it does not just violate the Constitution; it also undermines the legitimacy of American law enforcement. Instead of moving swiftly to redress the clear constitutional violation, the Fifth Circuit amplified the damage. Supreme Court intervention is necessary both to correct legal error in this case and to send a clear message about discriminatory charging practice in this country.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT OVER THE FIFTH CIRCUIT'S "SUBSTANTIAL NEED" TEST FOR FACT DEVELOPMENT.

In certain situations—as with the *Wiggins* prejudice prong requiring inmates to show the results of an adequate investigation—an inmate cannot plead a factu-

ally developed claim without a court award of resources necessary to develop it. 18 U.S.C. § 3599(f), the pertinent provision, provides:

> Upon a finding that investigative, expert, or other services are *reasonably necessary* for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g).

(Emphasis added.)[9] The Fifth Circuit interprets § 3599(f)'s reference to "reasonably necessary" services to require a showing of "substantial need," *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004). In applying its substantial-need rule to inmates like Mr. Ayestas—who have had no resources to develop *Wiggins* prejudice—the Fifth Circuit uses a § 3599(f) rule that starves meritorious IAC claims of resources. The Fifth Circuit's interpretation of § 3599(f) creates a split with the Fourth and Sixth Circuits, the latter of which expressly rejects the substantial-need rule.

A. The Fifth Circuit Used Its Substantial-Need Rule To Deny Experts And Investigators To Mr. Ayestas, An IAC Claimant Lacking Any Prior Opportunity To Develop Facts.

An IAC claimant must show that "[trial] counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins*, 539 U.S. at 521. A *Wiggins* claim alleges that trial counsel unreasonably narrowed a sentencing investigation by prejudicially failing to explore red flags appearing during the representation. *See id.* at 525. Mr. Ayestas pleaded a procedurally defaulted *Wiggins* claim in federal

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[9] Section 3599(f)'s precursor provision, analyzed in much of the precedent, also mandated that expert services be "reasonably necessary for the representation of the defendant." 21 U.S.C. § 848(q)(9); § 848(q)(4)(B) (applying the provision to capital defendants seeking habeas relief).

court at a time when its forfeiture could not be excused by deficient state habeas representation. In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013)—decided while *Ayestas* remained pending—this Court held that Texas inmates might assert a state habeas lawyer's ineffectiveness to excuse otherwise defaulted IAC claims. *See Trevino*, 133 S. Ct. at 1921; *Martinez*, 132 S. Ct. at 1316. This Court then granted, vacated, and remanded *Ayestas* for post-*Martinez/Trevino* consideration. *Ayestas v. Thaler*, 133 S. Ct. 2764 (2013) (mem.).

As do other post-*Martinez* claimants seeking to excuse forfeiture committed by state habeas counsel, Mr. Ayestas pleaded and briefed his *Wiggins* claim without having factually developed all aspects of it—most importantly, the prejudice prong. USCA5.691, 694. He then moved, under § 3599(f), for investigative resources necessary to develop his position. App.G1-G14. The § 3599(f) motion was not an unsupported request for a fishing expedition. Its appendix included a twenty-page investigation plan—created by an experienced mitigation specialist—setting forth details about the parameters, goals, and projected costs for the investigation. App.G17-G36. Its exhibits included three affidavits from family members attesting to various aspects of Mr. Ayestas' life, character, experiences, and behavior. App.G40-G63. Mr. Ayestas had also submitted a fifty-page brief on remand, USCA5.647-96, supplemented by a voluminous appendix containing, among other things, trial counsel's file and affidavits from family members. USCA5.845-81.

The § 3599(f) motion and complementary material recited trial counsel's failure to develop *or* present significant mitigating evidence. App.G8. It showed that,

despite her awareness of a history of substance abuse and red flags for mental health problems, trial counsel's preparation was delayed, rudimentary, and proceeded on a timeline inconsistent with her explanation that she throttled investigation on Mr. Ayestas' instruction. USCA5.687-88; App.G8. Mr. Ayestas explained that trial counsel's file disclosed a complete failure to investigate or pursue his mental health status. USCA5.685-86, 687-77. An inventory of her trial file, included as an exhibit to the brief on remand, reveals no attempt to retain or consult a mental health expert. USCA5.873-76.

Having been deficiently represented until the federal habeas phase, Mr. Ayestas could not specify precisely the omitted mitigation without being given resources to perform some of the investigation. His § 3599(f) motion and briefing on remand nevertheless gave a substantial picture of the omitted evidence. Additional family members and associates provided previously undisclosed information about the poverty and dysfunction that marked Mr. Ayestas' childhood, as well as changes in his behavior and demeanor over time. USCA5.680-84; App.G28-G29 (Nicole VanToorn Investigation Plan), G46 (Jose Magana Aff.), G54 (Nolvia Corea Aff.). The § 3599(f) motion made clear that these preliminary findings were only the tip of the iceberg. Mr. Ayestas provided the court specific details about the importance of an in-depth mental health evaluation, based on a psychologist's preliminary review of Mr. Ayestas' medical records. USCA5.769-78; App.G10.

The § 3599 motion also included the specialist's comprehensive investigation plan for piecing together Mr. Ayestas' turbulent life in Mexico, California, and Tex-

Texas—when signs of his mental illness likely emerged. App.G10-11; USCA5.684-85. The investigation plan contextualized much of the evidence that had already been collected, especially as it related to the onset of Mr. Ayestas' schizophrenia, and it also detailed resources the investigator needed to develop appropriately reliable findings. App.G27, G30-G36. The investigator similarly explained that further record collection and interviewing would uncover information relating to Mr. Ayestas' history of substance abuse. App.G33-G34.

As the § 3599 motion and the briefing on remand showed, state habeas counsel also performed deficiently, largely ignoring the *Wiggins* claim. USCA5.666-85; App.G1-G2, G7. The state habeas investigator had emphasized the importance of finally developing a social history, especially relating to Mr. Ayestas' substance abuse. USCA5.669. State habeas counsel's funding motion and notes demonstrate that he, too, understood the import of such evidence. USCA5.673, 768. He nevertheless disregarded the investigator's detailed plan and undertook the investigation himself, culminating in just three affidavits containing only good-character evidence. App.G7. State habeas counsel ignored new red flags about Mr. Ayestas' childhood and new leads for people with relevant information. He also knew about and failed to pursue the very same substance abuse and mental health evidence that trial counsel had ignored. USCA5.675-77; AppG7-G8. Because state habeas counsel failed to follow up on or litigate the schizophrenia diagnosis made during state habeas proceedings, he ignored the best corroboration imaginable for the proposition that trial counsel failed to discover crucial mental health evidence. To that end, Mr.

that end, Mr. Ayestas provided the district court with ample evidence regarding schizophrenia's typical progression and the timing of clues indicating when it began to affect his behavior. USCA5.678, 684-85; App.G10.

This support for his § 3599(f) motion notwithstanding, the district court denied it and withheld fact-development resources on the ground that Mr. Ayestas had not proven his entitlement to relief (App.C16), and then the Fifth Circuit "reinterpreted" that ruling as a decision that "any evidence of ineffectiveness, even if found, would not support relief" (App.A8). Remarking that the *Wiggins* claim was "meritless" and not "viable" (App.A8), it continued: "[A] prisoner cannot get funding to search for whatever can be found to support an as-yet unidentified basis for holding that his earlier counsel was constitutionally ineffective." App.A8.

Explaining that Mr. Ayestas could never meet the IAC deficiency prong, the Fifth Circuit stated that trial counsel: "spoke by phone" with Ayestas' Honduran relatives; "acquired Ayestas' school records;" knew of the substance abuse; and was "*examined by a psychologist.*" App.A10 (emphasis added). The Fifth Circuit then impermissibly "split" the prejudice inquiry into separate prejudice determinations, finding (1) that no jury would have found substance abuse sufficiently mitigating in light of the crime's brutality, and (2) that the chance of the mental health evidence influencing the verdict was "conceivable, but not substantially likely[.]" App.A11.[10] Upon realizing that trial counsel had not in fact hired a psychologist, the Fifth Circuit revised its opinion to focus on prejudice:

[10] Because it had held that there was no merit to the underlying claim, the Fifth

> Ayestas also points out that he was not in fact examined by a psychologist in 1997, but we stated he had been in our opinion. Our analysis is nonetheless unchanged. In our opinion, we held that even if Ayestas had shown there had been deficient performance under [*Strickland*], he did not show prejudice, that is, a substantial, not just conceivable, likelihood of a different result. Ayestas does not challenge this aspect of our panel opinion. Our conclusion that *Strickland* ineffectiveness was not shown remains unchanged.

App.B2 (internal quotation marks and citations omitted). After its revision, the surviving Fifth Circuit holding is that the *Wiggins* claim is meritless because Mr. Ayestas' motion papers and supplemental content did not prove that, but for the deficiency, there was a "substantial likelihood" of a life sentence.

The Fifth Circuit disposition in this case—denying a § 3599(f) motion for resources to develop facts in support of prejudice, on the ground that an inmate's motion failed to carry the ultimate burden of proof on that very question—is typical of how it uses the substantial-need standard to withhold expert and investigative services to post-*Martinez* IAC claimants. *See, e.g.*, *Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) (applying the substantial-need test and concluding that "the sought-after funding would have supported a meritless claim or would only supplement prior evidence"); *Crutsinger v. Stephens*, 576 F. App'x 422, 431 (5th Cir. 2014) ("*Martinez* * * * does not mandate pre-petition funding, nor does it alter our rule that a prisoner cannot show a substantial need for funds when his claim is procedurally barred from review."); *Wilkins v. Stephens*, 560 F. App'x 299, 315 (5th Cir. 2014) (denying fact development because "Wilkins offered little to no evidence that the investigative avenues counsel proposed to take hold any significant chance for

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Circuit ..lso held that there could be no state post-conviction deficiency. App.A12.

success"); *Sells v. Stephens*, 536 F. App'x 483, 499 (5th Cir. 2013) ("A petitioner cannot show a substantial need when his claim is procedurally barred from review.") (internal quotations omitted).

Texas district courts dutifully apply the Fifth Circuit rule, denying § 3599(f) services by premature reference to the merits of uninvestigated IAC claims. *See, e.g.*, Order Denying Motion for Funds at 5, Dkt. 58, *Ochoa v. Stephens*, 09-cv-2277 (N.D. Tex. Oct. 15, 2014) (denying resources because inmate "does not indicate how further investigation of [mitigation evidence] will substantially improve his chances of success"); Order at 4, Dkt. 56, *Tong v. Stephens*, No. 4:10-cv-2355 (S.D. Tex. Sept. 22, 2014) (noting that the Fifth Circuit rule requires a petitioner to "face[] something of a 'catch 22' in having to demonstrate that there is some relevant evidence he could discover without first having the funding to pursue that evidence," but denying services because he failed to demonstrate deficiency and prejudice); *Mamou v. Stephens*, 2014 WL 4274088, at *5 (S.D. Tex. Aug. 28, 2014) (denying services where petitioner "does not describe how [the] proposed investigation will meaningfully augment his anticipated claims" including "what he expects the interviews will uncover"); Order at 6, Dkt. 24, *Thompson v. Stephens*, No. 13-cv-1900 (S.D. Tex. May 2, 2014) (denying resources where inmate failed to describe, among other things, "what information did not come before the jury").

B. *Ayestas* Deepens A Split With The Fourth And Sixth Circuits, The Latter of Which Expressly Rejects The Substantial-Need Rule.

Only the Eleventh Circuit has signaled approval of the Fifth Circuit's substantial-need standard. *See Gary v. Warden, Georgia Diagnostic Prison*, 686 F.3d 1261, 1268 (11th Cir. 2012) ("We have interpreted the § 3599(f) phrase 'reasonably necessary' to mean the same as showing a 'substantial need' for the requested assistance."). The Fifth and Eleventh Circuits, however, do not apply the substantial-need rule identically. District courts in the Eleventh Circuit do not appear to require that inmates plead the product of the requested investigation in order to obtain § 3599(f) services—only that they show "good cause" for discovery. *See, e.g., Lee* v. *Humphrey*, 2013 WL 4482461, at *2 (S.D. Ga. Aug. 20, 2013) ("If a petitioner has not shown good cause for the [requested] discovery * * *, he is not entitled to an investigator to conduct the discovery or any experts to interpret the results of the discovery."); *Wilson v. Humphrey*, 2011 WL 2709696 at *4 (M.D. Ga. July 12, 2011) (same). In the Eleventh Circuit, there is good cause "where the specific allegations before the court show reason to believe that the petitioner may, *if the facts are fully developed*, be able to demonstrate that he is * * * entitled to relief." *Id.* (emphasis added) (citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

The Sixth Circuit, by contrast, has expressly rejected the substantial-need rule: "[A] showing of substantial necessity inappropriately 'implies that the movant must carry a heavier burden than that contemplated by the statute' as 'testimony could be reasonably necessary without being substantially necessary'." *Matthews v. White*, 807 F.3d 756, 760 n.2 (6th Cir. 2015) (internal citations omitted). Criticizing the Fifth and Eleventh Circuits, the Sixth Circuit went on to note that "[n]either

Circuit has explained why this heightened standard is appropriate." *Id.* Instead, courts in the Sixth Circuit have long applied the Fourth Circuit's approach in *Wright v. Angelone*, 151 F.3d 151 (4th Cir. 1998), in which "an expert should be appointed when a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance." *Id.* at 163. (Although the Fourth and Sixth Circuits use the same § 3599(f) standard, no Fourth Circuit case appears to have language expressly rejecting the Fifth Circuit's substantial-need formulation.)

The Sixth Circuit has underscored that "the need to show the existence of a substantial question is not the same as the [substantial-need requirement]." *Matthews*, 807 F.3d at 760 n.2. Whereas a Fifth Circuit petitioner fails to meet a substantial-need standard if entitlement to relief is not evident from an undeveloped record, courts in the Sixth Circuit have held that a petitioner falls short of "reasonable necessity" only when some prior factual development discloses that the claim cannot be successful—i.e., when there has been a prior opportunity to develop a claims, that opportunity has produced a record, and that record has been adjudged by a court. *See, e.g.*, *Foley v. White*, 2016 WL 4487994 at *1, 2-3 (6th Cir. Aug. 26, 2016) (applying substantial-question standard and upholding the district court's denial of funds because the petitioner's "competency and mental health have been discussed, analyzed and adjudged numerous times []" and the record was "expansive and detailed").

The Tenth Circuit appears not to have taken a position on the meaning of "reasonable necessity" under § 3599(f). *See, e.g.*, *Rojem v. Gibson*, 245 F.3d 1130,

1139 (10th Cir. 2001) (holding defendant did not show necessity and thus the district court did not abuse its discretion in denying funding). Otherwise, the remaining circuits use varied standards for "reasonable necessity," and all suggest a considerably lower standard than substantial need.

The Second, Third, and Ninth Circuits use a "private attorney" standard, which essentially requires inmates to show only that the fact development would be undertaken by a reasonable attorney hired by a client of financial means. *See, e.g., U.S. v. Pitts*, 346 F. App'x 839, 841-42 (3rd Cir. 2009) (to meet the "private attorney standard," which asks whether "a reasonable attorney would engage such services for a client having the independent financial means to pay for them," a defendant must "demonstrate with specificity the reasons why such services are required") (internal citations omitted); *Cooper v. Calderon*, 255 F.3d 1104, 1112 (9th Cir. 2001) (applying private attorney standard, as well as clear and convincing showing that lack of investigation prejudiced defendant); *U.S. v. Parker*, 4 F. App'x 111, 112 (2d Cir. 2001) (applying private attorney standard, and finding defendant must "articulate a reasonable basis for the requested services.") (internal citations omitted).

The First, Seventh, and Eighth circuits all use standards emphasizing that the pertinent showing does not have to include a speculative description of unknown information, but merely an indication that there may be favorable information that is undiscovered. *See, e.g., U.S. v. Thurmon*, 413 F.3d 752, 756 (8th Cir. 2005) ("While a trial court need not authorize an expenditure * * * for a mere 'fishing expedition,' it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the devel-

opment of a defense to the charge.") (internal citations omitted); *Burris v. Parke*, 130 F.3d 782, 784 (7th Cir. 1997) (holding that reasonable necessity requires a "preliminary showing"); *U.S. v. Brandon*, 17 F.3d 409, 456 (1st Cir. 1994) (finding defendant required "to make at least some showing why the requested assistance would produce evidence likely to be pivotal to his defense.") (internal citations and quotations omitted).

Fifth Circuit petitioners like Mr. Ayestas face unique obstacles to obtaining § 3599(f) services necessary to factually develop their claims—and, by extension, unique impediments to the enforcement of basic constitutional guarantees. The Sixth Circuit has expressly rejected the Fifth Circuit's approach, and all but one of the remaining appellate jurisdictions appear to reject it by implication.

C. Mr. Ayestas' § 3599(f) Motion for Resources Should Have Been Granted.

Meritorious habeas claims do not present themselves; federal lawyers use resources to identify and develop them. Legal services and fact-development resources available under § 3599—originally administered under a precursor provision—are crucial to "[research[ing] and identify[ing]" an inmate's "*possible* claims and their *factual bases*." *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (emphasis added). The fact development function secured by § 3599(f) reflects the principle that "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *Id.* at 858.

Under any standard other than "substantial need," Mr. Ayestas' § 3599 motion would have been granted. The Fifth Circuit's test, however, conditions the

availability of resources to develop facts on the ability of inmates to prove those very facts when they plead their claims. That logical circularity is impermissible when state habeas counsel forfeits a *Wiggins* claim; by definition, an inmate has never had the benefit of fact development on the Sixth Amendment challenge. The entitlement to experts and investigators cannot depend on the factual sufficiency of the pleading; *McFarland* itself held that, to be meaningful, § 3599(f) services "must be available prior to the filing of a first habeas petition." 512 U.S. at 860.

The Fifth Circuit practice does not just violate *McFarland*; it also frustrates the purposes of *Martinez* and *Trevino*, which together reflect this Court's recognition that state inmates can arrive at their federal habeas proceeding having been deprived of any prior opportunity to develop IAC claims and, as a corollary, to enforce the Sixth Amendment right to counsel. *See Trevino*, 133 S. Ct. at 1921 ("[F]ailure to consider a [state habeas lawyer's ineffectiveness as] a potential cause for excusing a procedural default will deprive the defendant of any opportunity at all for review of an [IAC] claim.") (internal quotations omitted); *Martinez*, 132 S. Ct. at 1318 ("By deliberately choosing to move [IAC litigation to a collateral-review phase in which counsel is not] constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims."). The basic premise of *Martinez* and *Trevino* is that the viability of IAC claims is not evident from an existing record, and requires investigation. *See Martinez*, 132 S. Ct. at 1318 ("Ineffective-assistance claims often depend on evidence outside the trial record."); *Trevino*, 133 S. Ct. at 1918 (pointing out that the Texas court has itself recognized the need for

extra-record evidence to substantiate an IAC claim). A § 3599(f) interpretation that withholds the experts and investigators necessary to develop an IAC claim guts the very constitutional guarantee that *Martinez* and *Trevino* sought to enforce.

Aggressive application of the substantial-need rule is particularly inappropriate when the issue is *Wiggins* prejudice. Although federal habeas counsel in possession of trial counsel's files may be capable of spotting and pleading a factually developed *Wiggins* deficiency prong, it cannot plead a factually developed *Wiggins* prejudice prong without enough resources to conduct at least some of the investigation into what trial counsel would have discovered had she not unreasonably narrowed her investigation. By definition, *Wiggins* prejudice requires an investigation because the prejudice *is the fruit of the investigation that should have been performed*. *See Wiggins*, 539 U.S. at 524 (counsel's "rudimentary knowledge of [their client's] history from a narrow set of sources" contrasted with undiscovered "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.") (internal citations and emphasis omitted).

With respect to the *Wiggins* claim here, the motion papers specified trial counsel's deficiency with particularity: failing to follow up on obvious red flags involving mental health and substance abuse. On prejudice, the motion papers identified categories of mitigating evidence that a resourced investigation would likely uncover, based upon those red flags. By definition, they could not present the results of an investigation with any greater specificity until the investigation was

conducted. Finally, the motion and complementary material showed that state habeas counsel committed the same mistakes as trial counsel, and that he ignored a schizophrenia diagnosis indicating that prior evidence of mental health problems almost certainly existed. Under the "substantial-question" standard from the Fourth and Sixth Circuits—or, for that matter, under a standard used by any jurisdiction other than the Fifth and Eleventh Circuits—the § 3599(f) motion would have been granted and the lower federal courts would not have proceeded to prematurely decide the *Wiggins* claim on the merits.[11]

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Ayestas prays that this Court grant a writ of certiorari to resolve the Questions Presented.

November 7, 2016

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[11] A determination that the lower courts impermissibly withheld § 3599 resources logically entails a vacatur of the Fifth Circuit's premature merits disposition of the underlying *Wiggins* claim. *Cf. Wellons v. Hall*, 558 U.S. 220, 223, 226 (2010) (vacating premature merits disposition on grounds that lower courts first had to decide entitlement to fact development).

NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Lee B. Kovarsky, hereby certify that true and correct electronic versions of this Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on November 7, 2016, via e-mail to:

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RECORDS AND BRIEFS

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No. 16-6795

In the Supreme Court of the United States

CARLOS MANUEL AYESTAS, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE;
(INSTITUTIONAL DIVISION)
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The Court has held that a federal habeas proceeding should not be stayed to allow a habeas petitioner to exhaust an unexhausted claim when that claim is plainly meritless. *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005). The Fifth Circuit determined that petitioner's new, unexhausted claims would be procedurally barred by Texas's abuse-of-the-writ statute and, therefore, lacked merit. Consequently, the Fifth Circuit denied a certificate of appealability regarding petitioner's request for a stay to pursue the claims further.

1. Would reasonable jurists debate whether to grant a *Rhines* stay when the petitioner has failed to show that his unexhausted claim would avoid being procedurally defaulted under Texas's abuse-of-the-writ statute?

Pursuant to 18 U.S.C. § 3599(f), district courts may authorize funding for investigative services in federal habeas cases when the services sought are "reasonably necessary" to the representation of the habeas petitioner. The Fifth Circuit determined that funding was not "reasonably necessary" when the claim sought to be investigated would fail on the merits regardless of the outcome of the investigation.

2. Is investigative funding "reasonably necessary" under § 3599(f) when a court has determined that the underlying ineffective-assistance claim will ultimately fail on the merits?

TABLE OF CONTENTS

Questions presented i

Table of authorities iii

Statement 2

I. Trial and conviction 2

II. State habeas proceedings 4

III. Federal habeas proceedings 6

Argument 13

I. Reasonable jurists would not debate whether to grant a *Rhines* stay to pursue a claim that will be procedurally defaulted 13

A. The Fifth Circuit's ruling that habeas proceedings should not be stayed to exhaust procedurally barred claims does not implicate a circuit split. 14

B. Jurisdictional and statutory questions make this case a poor vehicle to address the first question presented 18

1. Petitioner's request to add new claims is a second or successive petition that has not been authorized by the Fifth Circuit 18

2. Petitioner's new claims would be barred by AEDPA's statute of limitations. 20

II. The lower courts properly denied investigative funding after determining that petitioner's underlying claim would still lack merit. 21

A. There is no circuit split regarding whether to authorize funding to investigate claims that will ultimately fail. 22

B. Petitioner's funding claim also faces jurisdictional and statutory obstacles 27

C. The Fifth Circuit did not err in concluding that petitioner's ineffective-assistance claim lacked merit. 30

Conclusion 31

TABLE OF AUTHORITIES

Page(s)

Cases:

Aguilar v. Dretke,
428 F.3d 526 (5th Cir. 2005) 16

Atkins v. Virginia,
536 U.S. 304 (2002) 31

Ayestas v. Stephens,
553 F. App'x 422 (5th Cir. 2014) (per curiam) 8, 20

Ayestas v. Thaler,
133 S. Ct. 2764 (2013) 8

Ayestas v. Thaler,
462 F. App'x 474 (5th Cir. 2012) (per curiam) 8

In re Baker,
693 F.2d 925 (9th Cir. 1982) 27

Banse v. Sterling,
719 F.2d 241 (7th Cir. 1983) 27

Brown v. Stephens,
762 F.3d 454 (5th Cir. 2014) 24

Burris v. Parke,
130 F.3d 782 (7th Cir. 1997) 26-27

Burton v. Stewart,
549 U.S. 147 (2007) (per curiam) 18-19

Butler v. Stephens,
625 F. App'x 641 (5th Cir. 2015) (per curiam) 16

Cannon v. Gibson,
259 F.3d 1253 (10th Cir. 2001) 31

Cooper v. Calderon,
255 F.3d 1104 (9th Cir. 2001) 26

Crutsinger v. Stephens,
135 S. Ct. 1401 (2015) 24

Feldberg v. Quechee Lakes Corp.,
463 F.3d 195 (2d Cir. 2006) (per curiam) 19

Foley v. White,
835 F.3d 561 (6th Cir. 2016) 24, 25

Gonzalez v. Crosby,
545 U.S. 524 (2005) 20

Gray v. Gray,
645 F. App'x 624 (10th Cir. 2016) (per curiam) 16

Grundy v. Pennsylvania,
248 F. App'x 448 (3d Cir. 2007) 15

Harbison v. Bell,
556 U.S. 180 (2009) 24

Harrington v. Richter,
562 U.S. 86 (2011) 23

Henderson v. Stalder,
407 F.3d 351 (5th Cir. 2005) 20

Ex parte Hines,
Nos. WR-40,847-01, WR-40,847-03, 2012 WL 4928868 (Tex. Crim. App. Oct. 15, 2012) 16

Jaffe v. Brown,
473 F. App'x 557 (9th Cir. 2012) 15

Johnson v. Lee,
136 S. Ct. 1802 (2016) (per curiam) 16-17

Jones v. Page,
76 F.3d 831 (7th Cir. 1996) 31

Landano v. Rafferty,
859 F.2d 301 (3d Cir. 1988) (per curiam) 27, 28

Lee v. Humphrey,
No. CV 510-017, 2013 WL 4482461 (S.D. Ga. Aug. 20, 2013) 26

Liberty Mut. Ins. Co. v. Wetzel,
424 U.S. 737 (1976) 27

Lora v. O'Heaney,
602 F.3d 106 (2d Cir. 2010) 19

Mahone v. Ray,
326 F.3d 1176 (11th Cir. 2003) 19

Martel v. Clair,
565 U.S. 648 (2012) 23, 28

Martinez v. Ryan,
566 U.S. 1 (2012) 8, 24, 29

Matthews v. White,
807 F.3d 756 (6th Cir. 2015) 24, 25

Mayle v. Felix,
545 U.S. 644 (2005) 21

Newbury v. Stephens,
135 S. Ct. 1197 (2015) 24

Panetti v. Quarterman,
551 U.S. 930 (2007) 15

In re Pickett,
842 F.2d 993 (8th Cir. 1988) 27

Ex parte Reed,
Nos. WR–50,961–04, WR–50,961–05, 2009 WL 97260 (Tex. Crim. App. Jan. 14, 2009) 16

Rhines v. Weber,
544 U.S. 269 (2005) 1, 11, 14, 16

Rocha v. Thaler,
626 F.3d 815 (5th Cir. 2010) 17

Rojem v. Gibson,
245 F.3d 1130 (10th Cir. 2001) 26

Rojem v. Workman,
655 F.3d 1199 (10th Cir. 2011) 26, 28

Royal v. Taylor,
188 F.3d 239 (4th Cir. 1999) 31

Schriro v. Landrigan,
550 U.S. 465 (2007) 24, 30

Slack v. McDaniel,
529 U.S. 473 (2000) 14

Sonnier v. State,
913 S.W.2d 511 (Tex. Crim. App. 1995) 6

Ex parte Staley,
160 S.W.3d 56 (Tex. Crim. App. 2005) 16

Strickland v. Washington,
466 U.S. 668 (1984) 1, 12, 22

Taylor v. Horn,
504 F.3d 416 (3d Cir. 2007) 30

Trevino v. Thaler,
133 S. Ct. 1911 (2013) 8

United States v. Brandon,
17 F.3d 409 (1st Cir. 1994) 25

United States v. French,
556 F.3d 1091 (10th Cir. 2009) 27

United States v. Husband,
312 F.3d 247 (7th Cir. 2002) 20

United States v. Parker,
4 F. App'x 111 (2d Cir. 2001) 25

United States v. Pedraza,
466 F.3d 982 (10th Cir. 2006) 19

United States v. Pitts,
346 F. App'x 889 (3d Cir. 2009) 25

United States v. Rodrigues,
833 F.2d 1536 (11th Cir. 1987) (per curiam) 28

United States v. Stewart,
311 U.S. 60 (1940) 28

United States v. Thurmon,
413 F.3d 752 (8th Cir. 2005) 25

Wackerly v. Workman,
580 F.3d 1171 *(10th Cir. 2009)* 31

Waldrop v. Jones,
77 F.3d 1308 (11th Cir. 1996) 31

Walker v Martin,
562 U.S. 307 (2011) 16

Wiggins v. Smith,
539 U.S. 510 (2003) 6

Wilkins v. Davis,
832 F.3d 547 (5th Cir. 2016) 27

Wilkins v. Davis,
No. 16-723, 2017 WL 103565 (Jan. 11, 2017) 24

Williams v. Thaler,
602 F.3d 291 (5th Cir. 2010) 19

Wilson v. Humphrey,
Civil Action No. 5:10-CV-489, 2011 WL 2709696 (M.D. Ga. July 12, 2011) 26

Wright v. Angelone,
151 F.3d 151 (4th Cir. 1998) 25

Constitutional provisions, statutes and rules:

U.S. Const. amend. VIII 10, 13, 18, 21

18 U.S.C.:
§ 3006A 27
§ 3006A(e)(1) 25
§ 3006A(e)(3) 28
§ 3599(f) ..... i, 9, 10, 21, 23, 27
§ 3599(g)(2) 27, 28

28 U.S.C.:
§ 1291 27
§ 2244(b) 11, 19
§ 2244(d)(1)(A) 20
§ 2244(d)(1)(D) 20
§ 2244(d)(2) 20
§ 2253(c)(2) 14
§ 2254(b)(2) 24
§ 2254(e)(2) 9, 29

Pub. L. 100-690, 102 Stat. 4181 (Nov. 18, 1988) 28

Tex. Code Crim. Proc. art. 11.071:
§ 5(a) 11
§ 5(a)(1) 13, 16, 17

Tex. Code Crim. Proc. art. 37.071:
§ 2 4

Tex. Penal Code § 19.03(a)(2) 2

Fed. R. Civ. P.:
6(a) 25
6(b)(2) 19
7(b)(1)(B) 19
15 10
59(e) 10, 19
60(b) 19, 20

In the Supreme Court of the United States

No. 16-6795

CARLOS MANUEL AYESTAS, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
(INSTITUTIONAL DIVISION)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Neither question presented warrants the Court's consideration. The lower courts denied petitioner's request for a *Rhines* stay only after determining that petitioner's new claims would be procedurally defaulted. The courts' rulings do not implicate a circuit split or an important federal question, but only a correct application of Texas law. As for his request for funding to perform a mitigation investigation, the Fifth Circuit determined that, even if petitioner was able to further investigate evidence of his substance abuse and mental illness, his ineffective-assistance claim would still fail under the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner has not established that a circuit split exists regarding whether to fund investigations of meritless claims.

Moreover, there are numerous vehicle problems. In order to grant petitioner relief on either issue, the Court would have to address other threshold jurisdictional questions—

whether petitioner's request to add new claims is a second or successive habeas petition, and whether appellate courts have jurisdiction over appeals of § 3599(f) rulings. Likewise, petitioner has not explained how he will overcome the limitations on federal review of state habeas decisions imposed by the Antiterrorism and Effective Death Penalty Act. The Court should therefore deny the petition.

STATEMENT

I. TRIAL AND CONVICTION

On September 5, 1995, petitioner Carlos Manuel Ayestas and two others entered and ransacked the home of Santiaga Paneque, a 67-year-old woman.[1] Pet. App. C2-3; Pet. App. F3. They bound Paneque with duct tape on her ankles and wrists and beat her, causing multiple lacerations and broken bones in her elbow, neck, and face. Pet. App. C3-4. They then strangled her to death, which would have taken three to six minutes. Pet. App. C4.

Petitioner was identified by a neighbor as having visited Paneque two weeks earlier, and petitioner's fingerprints were on the duct tape used to bind Paneque. Pet. App. C2-5. Petitioner also confessed to Henry Nuila that he had been involved in murdering a woman in Houston and asked Nuila to help him kill his two accomplices because "they had spoken too much." Pet. App. C5. Petitioner threatened to kill Nuila if he refused to help. Pet. App. C6. A Harris County jury convicted petitioner of capital murder—specifically, intentionally committing murder in the course of committing or attempting to commit a burglary or robbery. Pet. App. C5; *see also* Tex. Penal Code § 19.03(a)(2).

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[1] Petitioner's real name is Dennis Zelaya Corea, but he was charged and convicted under the name Carlos Manuel Ayestas. Pet. App. A2.

At the punishment phase, the State presented evidence that petitioner served prison sentences in California and Texas for possession and purchase for sale of narcotics, burglary, and misdemeanor theft and that he was the subject of a California arrest warrant for illegal transportation of aliens. Pet. App. C5. The State also called Candelario Martinez, who testified that, three days after the murder of Paneque, petitioner pulled a gun on him, took his personal belongings, and announced that he or one of his accomplices was going to kill Martinez. Pet. App. C5-6. Petitioner eventually released Martinez, but threatened to kill Martinez's family if he told the police. Pet. App. C6.

As evidence of mitigation, petitioner's counsel presented three letters from an instructor at the Houston Community College System, indicating that petitioner was enrolled in an English-as-a-second-language course in the Harris County Jail and was a serious and attentive student. R.5219-24.[1]

Petitioner's trial counsel, Diana Olvera, explained during state habeas proceedings that petitioner affirmatively told her before trial that he did not want her to contact his family in Honduras, and only later did he acquiesce to her contacting his family after a jury had been chosen. Pet. App. C8-9. At that point, counsel sent multiple letters to petitioner's family (on May 29, June 10, and July 2, 1997) and had multiple phone conversations with them beginning on June 8. Pet. App. C9. Counsel also contacted the American Embassy in Honduras to try to expedite any travel arrangements and informed the Honduran consulate of the upcoming trial. Pet. App. C9; R.510. Petitioner's mother, however, did not appear concerned for her son and seemed evasive in her responses. Pet. App. C9. Petitioner's sister

[1] The Fifth Circuit's paginated record on appeal is cited as "R.[page]."

said it would be difficult to travel due to their father's illness and for economic reasons. Pet. App. C9. Trial counsel was ultimately unable to obtain the family's presence at the punishment phase of petitioner's trial.

The jury found that there was a likelihood that petitioner would commit future acts of criminal violence and that the mitigating evidence did not warrant a sentence of life imprisonment. Pet. App. C6; *see also* Tex. Code Crim. Proc. art. 37.071, § 2. The trial court sentenced petitioner to death. Pet. App. C6. The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence on November 4, 1998. R.1702-21.

II. State Habeas Proceedings

Petitioner was given new, state-appointed counsel for his state habeas proceedings. R.706, 5696. State habeas counsel filed a state habeas application that alleged ten instances of ineffective assistance of trial counsel, in addition to raising five other constitutional issues, R.5269-73. As relevant here, state habeas counsel argued that trial counsel Olvera was ineffective, in part, because she failed to adequately investigate mitigation evidence by talking to petitioner's family. R.5294-5301. State habeas counsel obtained affidavits from petitioner's mother and two of his sisters. R.5353-76. They described petitioner's "stable, middle class background" in which his mother and father had no marital problems and ran a small business in Honduras. R.5357, 5365, 5373. They also stated that petitioner had no major injuries or illnesses, no discernable learning disorders, and never got into any trouble with the law. R.5358, 5366, 5373-74. Instead, he received above average grades and attended church. R.5358, 5366, 5374.

State habeas counsel also hired an investigator who planned to pursue evidence of substance abuse by "conducting a thorough interview" of petitioner and interviewing individuals with whom petitioner was staying at the time of the crime. R.721. The investigator also suggested obtaining a psychological history of petitioner as part of creating a full social history, but did not note any specific mental-health issues. R.720.

In response, the State provided an affidavit from trial counsel Olvera who explained, as noted above, that petitioner repeatedly told her not to contact his family, that she made multiple attempts to contact his family when he changed his mind, and that she was unable to secure their presence at trial. R.5516-18.

At the request of state habeas counsel, petitioner was examined by a psychologist in 2008 (six years after his trial) for purposes of determining his intellectual functioning. R.776. The doctor determined he had an IQ in the "high average range," but did note that petitioner was "developing some delusional thinking" and had been placed on "antipsychotic medication." R.776.[3]

In 2008, the state district court recommended findings and conclusions that rejected petitioner's ineffective-assistance claim, and the Texas Court of Criminal Appeals adopted those findings and conclusions. R.5254-55. The district court specifically found that trial counsel Olvera

> spoke with [petitioner] numerous times about his family attending the trial; that [petitioner] repeatedly told counsel that [he] did not want his family contacted because of problems he and his family had in their home country of Honduras; that, to the best of counsel's recollection, [petitioner] did not agree

[3] Although state habeas counsel included this letter as an exhibit to one of petitioner's state habeas filings, counsel redacted the portion regarding delusional thinking and antipsychotic medication, R.5582, as counsel was using the letter to argue that petitioner should have been permitted to testify in his own defense, R.5558.

> to having his family contacted until after jury selection was completed; and that trial counsel made every effort to contact [petitioner]'s family once [he] agreed.

R.5919. The court made other findings regarding specific attempts by Olvera to contact petitioner's family and their ambivalent response, R.5920-22, and ultimately concluded that Olvera could not be considered ineffective for failing to contact petitioner's family, given petitioner's instructions to the contrary. R.5933 (citing *Sonnier v. State*, 913 S.W.2d 511, 522 (Tex. Crim. App. 1995) (holding that counsel was not ineffective for following defendant's express wishes not to present punishment evidence)). After adopting the relevant findings and conclusions, the Texas Court of Criminal Appeals denied habeas relief. R.5254-55.

III. FEDERAL HABEAS PROCEEDINGS

A. Petitioner filed his federal habeas petition in 2009 with new counsel. R.8-68. Pertinent here, petitioner raised an ineffective-assistance claim regarding the alleged failure of trial counsel Olvera to adequately investigate potentially mitigating evidence. R.14-33; *see Wiggins v. Smith*, 539 U.S. 510 (2003). Petitioner's allegations fell into two categories: (1) mitigation evidence that he believed could have been provided by his family, R.21-28; and (2) evidence relating to drug and alcohol use and mental illness, R.28-30.

The information that petitioner asserts would have been provided from his family is the same as that identified in his state habeas petition. R.21-28, 501 (describing petitioner's good character traits, his kindness and reputation for helping the less fortunate, his lack of criminal history in the Honduras, and the "bad influence" of one of his accomplices). Petitioner relied on the affidavits procured by state habeas counsel to argue that this information should have been discovered and presented to the jury as part of a mitigation case. R.21-28.

Petitioner also argued, for the first time, that trial counsel should have discovered and presented evidence to the jury of his substance abuse (alcohol and drugs) as well as his mental illness (psychosis and schizophrenia).[1] R.28. As evidence, petitioner relied on his Texas Department of Criminal Justice prison medical records beginning in 2000. R.28. Those records noted his history of substance abuse, some of his mental-health symptoms, and his diagnosis of psychosis and schizophrenia in 2001. R.28-29.

In response, the respondent Director argued that, as to the mitigation information that would have been provided by petitioner's family, trial counsel Olvera was not ineffective for following petitioner's wishes that she not contact his family. R.113-15. Respondent also argued that petitioner had not exhausted his state court remedies regarding his claims of substance abuse and mental illness. R.101-04.

The federal district court concluded that petitioner had procedurally defaulted his ineffective-assistance claim regarding his substance abuse and mental illness and that there was no cause and prejudice that would excuse the default. R.502-07. The court then rejected petitioner's ineffective-assistance claim as it pertained to the failure to contact his family. R.507-12. The court determined, as did the state habeas courts, that petitioner could not complain that his counsel was ineffective when counsel followed petitioner's affirmative instructions not to contact his family. R.511-12 (citing multiple cases). The court then denied a certificate of appealability. R.525-27.

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[1] The parties have never litigated whether petitioner, in fact, has substance abuse problems or a mental illness. Respondent does not concede either point, but the validity of those assertions does not impact whether the Fifth Circuit acted correctly or whether this Court should grant certiorari.

The Fifth Circuit also denied petitioner's request for a certificate of appealability. *Ayestas v. Thaler*, 462 F. App'x 474 (5th Cir. 2012) (per curiam). The court found no error in the state court's decision that petitioner prevented trial counsel Olvera from conducting a thorough mitigation investigation by telling her that she could not contact his family. *Id.* at 480. The Fifth Circuit also concluded that petitioner's unexhausted claims were procedurally defaulted, noting that "errors by habeas counsel cannot provide cause for a procedural default." *Id.* at 482.

Petitioner then filed a certiorari petition in this Court based on *Martinez v. Ryan*, 566 U.S. 1 (2012). Shortly thereafter, this Court decided *Trevino v. Thaler* and held that, under the Texas habeas system, the ineffectiveness of state habeas counsel can provide cause to overcome a procedural default. 133 S. Ct. 1911 (2013). The Court then granted petitioner's previous certiorari petition, vacated the Fifth Circuit's judgment, and remanded in light of *Trevino*. *Ayestas v. Thaler*, 133 S. Ct. 2764 (2013). The Fifth Circuit remanded to the district court "to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*." *Ayestas v. Stephens*, 553 F. App'x 422, 423 (5th Cir. 2014) (per curiam).

B. 1. On remand, petitioner argued that state habeas counsel was ineffective for failing to raise an ineffective-assistance-of-trial-counsel claim with respect to the potentially mitigating evidence of his substance abuse and mental illness. R.647-881.[5] After briefing on re-

[5] Petitioner attached numerous exhibits to his post-remand brief and relies on them in his certiorari petition. R.691-881; Pet. 5-13. But many of those exhibits were not presented to the state courts, R.707-12, 845-63, 887-81, and some of them were not created until after

mand was complete, petitioner moved in an ex parte and sealed motion for funding to conduct a mitigation investigation under 18 U.S.C. § 3599(f). R.942-50; Pet. App. G (filed under seal).[5]

Approximately two weeks later, the district court denied petitioner's habeas petition, concluding that his ineffective-assistance-of-trial-counsel claim concerning his substance abuse and mental illness was procedurally defaulted. Pet. App. C. The district court began by examining trial counsel's actions to determine whether there was an ineffective-assistance-of-trial-counsel claim that state habeas counsel could have raised. To the extent petitioner's mitigating evidence rested on information provided by petitioner's family, the court continued to hold that trial counsel Olvera was not ineffective, given petitioner's instructions to her. Pet. App. C10-11. As for petitioner's arguments regarding mental illness, the court found no evidence that trial counsel Olvera should have known of petitioner's mental illness at the time of trial. Pet. App. C11. The records relied on by federal habeas counsel all post-dated his criminal trial. Pet. App. A10, C11. The court also noted that state habeas counsel had raised many ineffective-assistance claims and was not required to raise every non-frivolous claim. Pet. App. C12. The court explained that "in light of the extremely brutal nature of Ayestas's crime and Ayestas's history of criminal violence, it is highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding." Pet. App. C12.

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remand, R.698-704, 864-72. Petitioner has not explained how he has satisfied 28 U.S.C. § 2254(e)(2) which limits the introduction of new evidence in a federal habeas proceeding.

[5] That ex parte motion has remained sealed and has not, to date, been provided to counsel for respondent, even though it has been made part of the Petition Appendix and provided to the Court under seal.

The district court also denied petitioner's request for funding for additional investigative services under 18 U.S.C. § 3599(f). Pet. App. C13-14. The court determined that petitioner had not shown that trial counsel Olvera was deficient, that there was a reasonable probability that his substance-abuse evidence would have changed the outcome of his criminal proceedings, or that state habeas counsel was ineffective. Pet. App. C14. Because petitioner's ineffective-assistance-of-trial-counsel claim lacked merit and was procedurally defaulted, the requested funding was not "reasonably necessary" under § 3599(f). Pet. App C14. Finally, the court denied a certificate of appealability and entered a final judgment on November 18, 2014. Pet. App. C14-16; R.968.

On December 16, 2014, petitioner moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that *Martinez* and *Trevino* required further development of the evidence and that the district court had prematurely rejected his ineffective-assistance claim. R.969-1006. While the district court was considering this motion, petitioner's federal habeas counsel reviewed the prosecution's file at the District Attorney's office in Houston and discovered a capital memo prepared in 1995 by Kelly Siegler. R.1135; Pet. App. F. The Siegler memo listed two potential aggravating circumstances: (A) the victim was a helpless 67 year old woman killed in her home; and (B) petitioner was not a citizen. Pet. App. F3. A line was drawn through the second aggravating circumstance regarding petitioner's citizenship. Pet. App. F3. On January 9, 2015, petitioner moved to amend his petition under Federal Rule of Civil Procedure 15 to include an equal-protection claim and an Eighth Amendment claim based on the Siegler memo. R.1132. On January 14, 2015, petitioner also filed a supplemental motion to alter and amend the judgment that argued for inclusion of these new claims, as well as a motion to stay and hold the petition in abeyance

while he exhausted his new claims in state court pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). R.1143, 1152.[1]

The district court denied the motion to amend petitioner's federal habeas petition and motion for a *Rhines* stay. Pet. App. D. The court noted that a *Rhines* stay is inappropriate when a claim is "plainly meritless." Pet. App. D5 (quoting *Rhines*, 544 U.S. at 277). The court then referenced Texas's abuse-of-the-writ statute, which limits subsequent habeas applications to cases when, as relevant here:

> [T]he current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article of Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

Pet. App. D5 (quoting Tex. Code Crim. Proc. art. 11.071 § 5(a)). The court noted that petitioner failed to show that the Siegler memo could not have been previously discovered. Pet. App. D5. Absent that showing, the Texas courts would not consider petitioner's subsequent petition. Pet. App. D5-6.

The district court later denied petitioner's motion to alter or amend the judgment. Pet. App. E. The court also held that petitioner's supplemental motion to alter or amend the judgment regarding the Siegler memo was, in fact, a second or successive petition, given that it fell outside the limited scope of the Fifth Circuit's remand. Pet. App. E3. Consequently, the district court concluded it was without jurisdiction to hear petitioner's new claims unless and until petitioner complied with 28 U.S.C. § 2244(b). Pet. App. E3-4.

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[1] Petitioner makes additional allegations regarding Siegler that he did not make below. Pet. 3-4 n.3. The Court should decline to consider that extra-record evidence.

2. The Fifth Circuit affirmed the denial of funding and declined to grant a certificate of appealability on petitioner's request for a *Rhines* stay. Pet. App. A1. As to the denial of funding, the Fifth Circuit held it was permissible for the district court to determine the viability of petitioner's ineffective-assistance-of-trial-counsel claim before deciding whether to authorize funding. Pet. App. A8. The court further interpreted the district court's ruling "as being that any evidence of ineffectiveness, even if found, would not support relief." Pet. App. A8. The court then turned to whether trial counsel was ineffective and whether that ineffectiveness prejudiced petitioner under *Strickland*, 466 U.S. at 687.

The Fifth Circuit again rejected any arguments based on information that would have come from petitioner's family due to petitioner's request that trial counsel not contact his family. Pet. App. A9-10. The court also agreed that it was highly unlikely that evidence of substance abuse would have changed petitioner's sentence, given the brutality of the crime. Pet. App. A11. Regarding mental illness, the court noted that all evidence of mental illness post-dated petitioner's criminal trial. Pet. App. A10. The court erroneously stated that trial counsel Olvera had petitioner examined by a psychologist and was, therefore, not ineffective. Pet. App. A11. But the court also ruled that evidence of mental illness was not substantially likely to change petitioner's sentence. Pet. App. A11. Consequently, even if petitioner's investigation was funded, he could not have shown prejudice under *Strickland*. As a result, state habeas counsel was not ineffective for failing to raise the same claims and petitioner's ineffective-assistance-of-trial-counsel claim remained procedurally barred. Pet. App. A12. The court, therefore, found no abuse of discretion in the denial of funding for a mitigation investigation under § 3599(f). Pet. App. A12.

The court also denied petitioner's request for a certificate of appealability regarding his motion for a *Rhines* stay. Pet. App. A13-17. The court agreed with the district court's conclusion that a stay would be futile because Texas courts would not have considered petitioner's second habeas application. Pet. App. A15 (citing Tex. Code Crim. Proc. art. 11.071 § 5(a)(1)). Because petitioner had not explained why the Siegler memo was unavailable to him at the time his initial state habeas application was filed, he could not meet the state standard for a second application. Pet. App. A15-17.

Petitioner moved for panel and en banc rehearing. The court denied rehearing en banc, and the panel issued a short opinion on rehearing. Pet. App. B. The court recognized that it had incorrectly stated that petitioner was examined by a psychologist in 1997. Pet. App. B2. The court, however, held that its result was unchanged because petitioner had not proven prejudice under *Strickland*. Pet. App. B2.

Petitioner filed the instant certiorari petition on November 7, 2016.

ARGUMENT

I. REASONABLE JURISTS WOULD NOT DEBATE WHETHER TO GRANT A *RHINES* STAY TO PURSUE A CLAIM THAT WILL BE PROCEDURALLY DEFAULTED.

The first issue that petitioner raises—whether he should have received a *Rhines* stay—does not warrant the Court's review. The lower courts were correct to deny this stay, and petitioner has not identified a circuit split or a significant federal question. Beyond that, petitioner faces a jurisdictional hurdle: his new equal-protection and Eighth Amendment claims are a second or successive petition that the district court is without jurisdiction to consider. Petitioner has also not explained how his new claims will avoid AEDPA's statute of limitations.

A. The Fifth Circuit's ruling that habeas proceedings should not be stayed to exhaust procedurally barred claims does not implicate a circuit split.

Petitioner's *Rhines* issue is presented in the framework of a certificate of appealability. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied petitioner's request to amend and stay on procedural grounds, he must show that reasonable jurists would debate whether the district court was correct in that procedural ruling and whether he stated a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Petitioner's specific complaint is that the lower courts applied an "anticipatory default" to his new claims when they concluded that Texas's abuse-of-the-writ statute would bar petitioner from exhausting those claims in state court. Pet. 18-20. Petitioner has not identified a circuit split on this issue, has not explained his conclusion that Texas's abuse-of-the-writ statute is not an adequate and independent state-law ground for denying a habeas petition, and has not demonstrated that the lower courts erred.

1. *Rhines* held that district courts faced with "mixed" habeas petitions—petitions containing both exhausted and unexhausted claims—may stay the litigation in certain circumstances to allow the habeas petitioner to exhaust unexhausted claims in state court. 544 U.S. at 277. But the Court cautioned that the stay and abeyance procedure should be available "only in limited circumstances." *Id.* The district court must determine that there was "good cause" for the petitioner's failure to exhaust claims in state court. *Id.* The Court also concluded that it would be an abuse of discretion to grant a stay when the "unexhausted claims are plainly meritless." *Id.*

The Fifth Circuit accurately identified this legal standard and correctly concluded that "[w]hen a petitioner is procedurally barred from raising [his] claims in state court, his unexhausted claims are plainly meritless." Pet. App. A14. The court then applied the Texas abuse-of-the writ statute to petitioner's new claims, concluded that they would be procedurally defaulted, and denied a *Rhines* stay to pursue the claims further. Pet. App. A15-17.

Despite his argument that the Fifth Circuit wrongly relied on an "anticipatory" procedural default, petitioner has not identified any other circuit court that has held differently in these circumstances. Pet. 17-20. To the contrary, several circuits have, in the context of addressing mixed petitions, considered whether a procedural bar would ultimately prevent the petitioner from presenting unexhausted claims in federal court. *See, e.g.*, *Gray v. Gray*, 645 F. App'x 624, 626 (10th Cir. 2016) (per curiam) (stating that a district court may, among other options, choose to apply an "anticipatory procedural bar" to unexhausted claims in a mixed petition or it may choose to stay the case under *Rhines*); *Jaffe v. Broum*, 473 F. App'x 557, 559 (9th Cir. 2012) (requiring the district court to determine "whether any California procedure remains available" to a petitioner with unexhausted claims and stating that procedurally defaulted claims must be dismissed); *Grundy v. Pennsylvania*, 248 F. App'x 448, 452 (3d Cir. 2007) (affirming denial of a *Rhines* stay when the unexhausted claim would have been procedurally barred).

The Fifth Circuit's conclusion—that claims that would be procedurally defaulted are "plainly meritless" and, thus, do not warrant a *Rhines* stay—is not unusual or unprecedented. AEDPA is designed to "further the principles of comity, finality, and federalism," to "reduc[e] piecemeal litigation," and to "streamlin[e] federal habeas proceedings." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Rhines*, 544 U.S. at 276. Those goals are frustrated when petitioners are allowed to "run to federal court and begin anew" after they have failed to properly exhaust their claims in state court. *Duncan v. Walker*, 533 U.S. 167, 179 (2001). Granting a stay when the unexhausted claims would be procedurally defaulted in state court undermines those goals. *Rhines*, 544 U.S. at 277-278. Indeed, this Court has recognized that "[i]t would be pointless to require a petitioner to present a claim to a state court that clearly would not entertain it." *Ortiz v. Stephens*, 136 S. Ct. 1541, 1549 (2016) (per curiam). Petitioner's argument that the Fifth Circuit's decision is wrong (Pet. 20-23) is thus unpersuasive.

federal habeas proceedings with a *Rhines* stay if his unexhausted claims will be procedurally defaulted. *See Rhines*, 544 U.S. at 277 (noting that granting a stay "frustrates AEDPA's objective of encouraging finality").

2. Petitioner incorrectly argues that the Fifth Circuit erred in applying Texas's abuse-of-the-writ statute. As relevant here, Texas's abuse-of-the-writ statute prohibits successive habeas petitions when "the current claims and issues have not been and could not have been presented previously in a timely initial application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). To avoid this procedural bar, petitioner asserts that § 5(a)(1) is not an "adequate" procedural ground for denying a habeas petition. Pet. 24; *see also* Pet. i (stating that the procedural bar was "not actually grounded in state law"). But he provides no citation or explanation for this argument.

A state rule is "adequate" when it is "firmly established and regularly followed." *Walker v Martin*, 562 U.S. 307, 316 (2011). Texas has regularly applied § 5(a)(1) to bar subsequent habeas petitions. *See, e.g.*, *Ex parte Hines*, Nos. WR-40,347-01, WR-40,347-03, 2012 WL 4928863, at *1 (Tex. Crim. App. Oct. 15, 2012); *Ex parte Reed*, Nos. WR-50,961-04, WR-50,961-05, 2009 WL 97260, at *1 (Tex. Crim. App. Jan. 14, 2009); *Ex parte Staley*, 160 S.W.3d 56, 63-66 (Tex. Crim. App. 2005). The Fifth Circuit has also routinely recognized § 5(a)(1) as providing an adequate and independent state-law ground for denying a habeas claim. *See, e.g.*, *Butler v. Stephens*, 625 F. App'x 641, 657-59 (5th Cir. 2015) (per curiam); *Aguilar v. Dretke*, 428 F.3d 526, 533 (5th Cir. 2005) ("This court has consistently held that Texas' abuse-of-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling."); *see also Johnson v. Lee*, 136 S. Ct. 1802 (2016)

(per curiam) (reversing Ninth Circuit's decision that California's bar on subsequent habeas petitions was not adequate and independent).[8]

Texas's abuse-of-the-writ statute is an adequate and independent bar to habeas relief. As a result, it was not erroneous for the Fifth Circuit to consider whether petitioner's new claims would be procedurally defaulted under § 5(a)(1).

3. Because petitioner would need to file a subsequent habeas petition in state court, he would have to demonstrate that the Siegler memo (the "factual basis" for his claim) was "unavailable" at the time his original state habeas petition was filed in order to avoid the procedural bar of § 5(a)(1).[9] He has not done so.

The key question that petitioner has failed to answer was why it took until December 2014, after he had been denied federal habeas relief, before any of his attorneys discovered the Siegler memo. It is possible that the memo, written in 1995 and approved in 1997, has been in the prosecution's file and available to petitioner's counsel for over fifteen years. *See* Pet. 23 (explaining that the State permits defense counsel to review its files after trial and after redacting any work product). Petitioner has not demonstrated otherwise, and it is his burden to show that the factual basis for his new claim was previously unavailable. Simply

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[8] There is an exception to this general rule: when a Texas court determines that the legal or factual basis of the subsequent petition was unavailable but then denies the petition on its merits, the decision is no longer "independent." *Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010). That scenario is not presented in this case, as the lower courts were concerned with the availability of petitioner's new evidence, not the merits of his constitutional claims.

[9] Respondent does not concede that the Siegler memo would have established a constitutional violation.

stating that the memo was not found until 2014 does not explain whether it was unavailable until 2014.[10]

Absent an explanation of the Siegler memo's unavailability, Texas courts would apply the abuse-of-the-writ statute to bar petitioner's subsequent habeas application, and federal courts would determine the new claims were procedurally defaulted. Reasonable jurists would not debate whether a *Rhines* stay was appropriate for this meritless claim, and the Fifth Circuit properly denied a certificate of appealability.

B. Jurisdictional and statutory questions make this case a poor vehicle to address the first question presented.

This case is also a poor vehicle for addressing the first question raised by petitioner. First, petitioner's request to add equal-protection and Eighth Amendment claims should be treated as a request to file a second or successive petition that has not been authorized by the Fifth Circuit. Second, petitioner has not explained how he would overcome AEDPA's statute of limitations.

1. Petitioner's request to add new claims is a second or successive petition that has not been authorized by the Fifth Circuit.

The district court properly denied petitioner's request to add new claims based on the Siegler memo to his existing habeas petition because his new claims are a second or successive petition that was never authorized by the Fifth Circuit. The district court was, therefore, without jurisdiction to consider petitioner's new claims. *See Burton v. Stewart*, 549

[10] That the memo is privileged is of no moment at this juncture. Pet. 22-24. The fact that it is privileged explains why it was not voluntarily turned over to petitioner's counsel during the criminal trial. But it does not explain how it ended up in the publicly available file of the prosecutor, when it was placed there, or whether petitioner could have found it sooner.

U.S. 147, 157 (2007) (per curiam) (holding that a district court is without jurisdiction to entertain second or successive habeas petitions that have not been authorized by the court of appeals).

Because the district court had already denied his habeas petition and entered a final judgment, petitioner sought to add his new claims through a Rule 59(e) motion to alter or amend the judgment. *See supra* pp. 9-11. A Rule 59(e) motion that seeks to add new claims should be treated as a second or successive habeas petition. *See Williams v. Thaler*, 602 F.3d 291, 303-05 (5th Cir. 2010); *United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir. 2006). Petitioner was therefore required to seek authorization from the Fifth Circuit before adding his new claims. *See* 28 U.S.C. § 2244(b).

Even so, petitioner's "supplemental" Rule 59(e) motion, raising the Siegler-memo claims, was not filed until January 14, 2015, R.1148—fifty-seven days after the district court's final judgment. The Federal Rules of Civil Procedure prohibit courts from extending the deadline to file motions under Rule 59(e). Fed. R. Civ. P. 6(b)(2). Because the issues raised in his supplemental Rule 59(e) motion are entirely distinct from those in his timely filed motion, his supplemental motion should not relate back to the filing of his original motion. *See Feldberg v. Quechee Lakes Corp.*, 463 F.3d 196, 197 (2d Cir. 2006) (per curiam); *see also* Fed. R. Civ. P. 7(b)(1)(B) (motions must "state with particularity the grounds" for seeking relief). The circuit courts typically treat untimely Rule 59(e) motions as Rule 60(b) motions seeking relief from a final judgment. *See, e.g.*, *Lora v. O'Heaney*, 602 F.3d 106, 111 (2d Cir. 2010); *Mahone v. Ray*, 326 F.3d 1176, 1177 n.1 (11th Cir. 2003). Thus, petitioner's untimely supplemental Rule 59(e) motion should be considered as a Rule 60(b) motion.

In *Gonzalez v. Crosby*, the Court held that Rule 60(b) motions that seek to add entirely new constitutional grounds to a habeas petition must be treated as second or successive habeas petitions. 545 U.S. 524, 582 (2005). Consequently, petitioner must comply with § 2244(b) and first seek authorization to file a second habeas petition from the Fifth Circuit. He has not done so and, until he does, the district court will lack jurisdiction over his claims.

This same result is reached by applying the mandate rule, as both lower courts did. Pet. App. A13-14, E3-4; *see Henderson v. Stalder*, 407 F.3d 351, 354 (5th Cir. 2005). Petitioner's request to add new claims falls outside the mandate of the Fifth Circuit, which instructed the district court to consider the unexhausted ineffective-assistance claim. *Ayestas*, 553 F. App'x at 423. And, again, petitioner has not explained why he could not have raised his new claims before the Fifth Circuit's ruling on his initial appeal. *See United States v. Husband*, 312 F.3d 247, 250 (7th Cir. 2002) ("[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded.").

2. Petitioner's new claims would be barred by AEDPA's statute of limitations.

Petitioner also fails to explain how he would avoid AEDPA's statute of limitations. Any federal habeas petition must be filed, as relevant here, within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A), (D). Time spent pursuing state habeas relief is not counted against this limitation. *Id.* § 2244(d)(2).

This Court has held that "[a]n amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle v. Felix*, 545 U.S. 644, 650 (2006). Petitioner's new equal-protection and Eighth Amendment claims are different in time and type from those raised in his original federal habeas petition and, therefore, would not relate back. Should petitioner be permitted to amend his petition and assert his new claims, those claims would be well outside the one-year limitations period. Petitioner would, therefore, have to prove that the factual predicate of his claims (the Siegler memo) could not have been discovered through the exercise of due diligence until less than one year before bringing his claim. As noted above, petitioner has not established that the Siegler memo could not have been discovered earlier. Consequently, petitioner has not shown that his claim would satisfy AEDPA's statute of limitations.

These jurisdictional and statutory obstacles would prevent the Court from reaching the merits of petitioner's *Rhines* arguments and present additional reasons why the Court should not grant certiorari.

II. The Lower Courts Properly Denied Investigative Funding After Determining That Petitioner's Underlying Claim Would Still Lack Merit.

In the second question presented, petitioner urges the Court to find that the Fifth Circuit unreasonably interpreted and applied 18 U.S.C. § 3599(f), which states:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so

> authorized, shall order the payment of fees and expenses therefor under subsection (g).

Petitioner's arguments miss the point. The Fifth Circuit determined that, *even if* petitioner conducted the investigation for which he sought funding, his ineffective-assistance claim would still fail to meet the prejudice prong of *Strickland*. Having concluded that petitioner's underlying ineffective-assistance claim lacked merit, the court denied funding to further develop it. Moreover, there are significant vehicle problems: In order to address petitioner's second question presented, the Court would first have to confront whether it has jurisdiction over appeals of § 3599(f) decisions and whether petitioner would be able to overcome AEDPA's standards for introducing additional evidence.

A. There is no circuit split regarding whether to authorize funding to investigate claims that will ultimately fail.

1. Because petitioner seeks to prove ineffective assistance, he must show not only that trial counsel Olvera's representation "fell below an objective standard of reasonableness," but also that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 688, 695. Petitioner sought funding under § 3599(f) to assist him in investigating the alleged ineffectiveness of both trial counsel and state habeas counsel. R.942-49.

The Fifth Circuit has explained that "reasonably necessary" under § 3599(f) means a showing of "substantial need." Pet. App. A7-8. In other words, the habeas petitioner must be investigating "a viable constitutional claim, not a meritless one," and cannot be searching

for "evidence that is supplemental to evidence already presented." Pet. App. A8.[11] Petitioner erroneously asserts that the Fifth Circuit's application of § 3599(f) required him to prove his *Strickland* claim before gaining access to funding. Pet. 32. The Fifth Circuit did not impose such a standard.

Instead, the Fifth Circuit recognized that petitioner had offered a "substantiated argument" regarding the need to investigate the omissions of prior counsel. Pet. App. A8. But the court determined that it was "highly unlikely" that substance abuse evidence would have altered the outcome of the sentencing phase and "conceivable, but not substantially likely," that evidence of petitioner's mental illness would have altered the outcome. Pet. App. A9; *see also* Pet. App. B2; *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (stating that, when assessing prejudice under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable"). Having concluded that petitioner's ineffective-assistance claim would fail to meet *Strickland*'s prejudice prong, the court affirmed the denial of funding. The denial of funding, therefore, did not come down to some undefined gap between "reasonably necessary" and "substantial need," as there was no need to authorize funding to develop a meritless claim. *Cf. Martel v. Clair*, 565 U.S. 648, 666 (2012) ("The court was not required to appoint a new lawyer [under § 3599] just so [habeas petitioner] could file a futile motion.").

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[11] Moreover, the language in § 3599(f) states that a district court "may" authorize funding, suggesting that district courts have some discretion to deny funding even upon a showing of reasonable necessity.

The Fifth Circuit's decision to consider the merits of petitioner's ineffective-assistance claim at this stage of the proceedings is not at odds with the Court's precedent, *see Martinez*, 566 U.S. at 15-16 (anticipating that the States would argue that the underlying ineffective-assistance claim lacked merit), or with AEDPA, *see* 28 U.S.C. § 2254(b)(2) (allowing district courts to deny a petition on the merits even if the petitioner failed to exhaust his state court remedies). *Cf. Schriro* v. *Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record . . . precludes habeas relief, a district court is not required to hold an evidentiary hearing."). The Court has already denied multiple certiorari petitions raising this issue. *See Wilkins* v. *Davis*, No. 16-723, 2017 WL 103565 (Jan. 11, 2017); *Crutsinger* v. *Stephens*, 135 S. Ct. 1401 (2015); *Newbury* v. *Stephens*, 135 S. Ct. 1197 (2015). It should deny this petition as well.

2. Petitioner attempts to manufacture a circuit split where there is none. Pet. 33-37. The cases he cites concern different circumstances and, often, different statutes or rules. He does not cite any case in which funding under § 3599(f) was authorized for a claim the court determined was meritless.

First, the Sixth Circuit cases that petitioner cites involve clemency proceedings, and, as the Sixth Circuit has recognized, "[c]lemency proceedings present different issues" than federal habeas proceedings. *Matthews* v. *White*, 807 F.3d 756, 760 (6th Cir. 2015); *see also Foley* v. *White*, 835 F.3d 561 (6th Cir. 2016). Relying on a Fifth Circuit opinion, *Brown* v. *Stephens*, 762 F.3d 454, 460 (5th Cir. 2014), the Sixth Circuit has explained that "[c]lemency 'proceedings are a matter of grace entirely distinct from judicial proceedings.'" *Matthews*, 807 F.3d at 760 (also quoting *Harbison* v. *Bell*, 556 U.S. 180, 192 (2009)). What is "necessary" in a clemency proceeding that is concerned with executive grace is, therefore, very

different from what is "necessary" in a federal habeas case that is concerned with legal standards, evidence, and burdens of proof. Consequently, the Sixth Circuit cases did not consider whether to fund an investigation into a habeas claim that lacked merit.

Even so, application of the Sixth Circuit's test would not have resulted in a different outcome. The Sixth Circuit requires the petitioner to show that "'a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance.'" *Id.* (quoting *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998)). Here, the Fifth Circuit essentially determined that there was no substantial question regarding the prejudice prong of *Strickland* and, therefore, no need for funding. Pet. App. A11; *see also Foley*, 835 F.3d at 564 (finding no need to hire a neuropsychologist when the petitioner's arguments "have consistently been found to be without merit"). Under the circumstances of this case, then, the difference in language between the Fifth and Sixth Circuits would not have altered the result.[12]

Second, petitioner cites multiple cases that concern investigative assistance under 18 U.S.C. § 3006A(e)(1), which permits courts to authorize investigative or expert funding in criminal cases. Pet. 36-37 (citing *United States v. Pitts*, 346 F. App'x 839 (3d Cir. 2009); *United States v. Thurmon*, 413 F.3d 752 (8th Cir. 2005); *United States v. Parker*, 4 F. App'x 111 (2d Cir. 2001); *United States v. Brandon*, 17 F.3d 409 (1st Cir. 1994)). But § 3006A(e)(1) contains mandatory language (a court "shall" authorize funding when it is "necessary for adequate representation") and applies in an entirely different context—criminal trial. A court handling a criminal matter could not conclude that a criminal defendant was guilty

[12] For the same reason, the Fourth Circuit's identical wording of the test also does not present a circuit split. *See Wright*, 151 F.3d at 163.

and deny investigative funding. Cases concerning § 3006A are not, therefore, instructive in these collateral habeas circumstances in which petitioner's claim lacked merit.

Third, petitioner cites several district court cases that he claims apply a "good cause" standard for investigative assistance. Pet. 34. But those cases concern discovery under Rule 6(a) of the Rules Governing Section 2254 Cases, which allows a judge to authorize discovery in habeas cases for "good cause." *Lee v. Humphrey*, No. CV 510-017, 2013 WL 4482461 (S.D. Ga. Aug. 20, 2013); *Wilson v. Humphrey*, Civil Action No. 5:10-CV-489, 2011 WL 2709696 (M.D. Ga. July 12, 2011). Those district courts concluded that, absent a threshold determination that good cause exists to conduct discovery, there was no need to fund investigative assistance. *Lee*, 2013 WL 4482461, at *2; *Wilson*, 2011 WL 2709696, at *4. Indeed, in *Lee*, the court found good cause for discovery but still declined to fund investigative services, demonstrating that the court was not applying a "good cause" standard to § 3599(f). 2013 WL 4482461, at *6-7.

The remaining cases cited by petitioner do not establish a circuit split. The Tenth Circuit has simply referred to the language of § 3599(f), *Rojem v. Gibson*, 245 F.3d 1130, 1139 (10th Cir. 2001), and has elsewhere indicated that it lacks jurisdiction over appeals of § 3599(f) decisions, *Rojem v. Workman*, 655 F.3d 1199, 1202 (10th Cir. 2011). The Ninth Circuit case cited by petitioner concerns when the denial of funds can be reversed and requires proof that the lack of funding prejudiced the petitioner. *Cooper v. Calderon*, 255 F.3d 1104, 1112 (9th Cir. 2001). There is no reason to conclude that the Ninth Circuit would require funding of meritless claims. Finally, the Seventh Circuit requires a "preliminary showing" before funding may be authorized, *Burris v. Parke*, 130 F.3d 782, 784 (7th Cir.

1997), but there is no indication that a determination that an underlying claim lacks merit would still result in funding.

B. Petitioner's funding claim also faces jurisdictional and statutory obstacles.

1. To reach the second question presented, the Court would have to confront the predicate question whether there is appellate jurisdiction over appeals of the denial of funding under § 3599(f). *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976) (stating that the Court has an obligation to question its own appellate jurisdiction). Section 3599 closely circumscribes the review available for funding determinations and does not itself provide for appellate review of the denial of funds. 18 U.S.C. § 3599(f), (g)(2).

Congress has granted courts of appeals jurisdiction to review "final decisions" of the district courts. 28 U.S.C. § 1291. The courts of appeals, however, have held that § 1291 "necessarily refers to final decisions of a judicial character, not to administrative actions . . . outside the scope of the litigative function." *In re Baker*, 693 F.2d 925, 926-27 (9th Cir. 1982); *see, e.g.*, *Wilkins v. Davis*, 832 F.3d 547, 558-59 (5th Cir. 2016); *In re Pickett*, 842 F.2d 993, 995 (8th Cir. 1988); *Bense v. Starting*, 719 F.2d 241, 244 (7th Cir. 1983). Thus, for example, the courts of appeals are unanimous that fee determinations made under the Criminal Justice Act (18 U.S.C. § 3006A) are administrative acts not reviewable under § 1291. *United States v. French*, 556 F.3d 1091, 1093 (10th Cir. 2009) ("Every circuit court of appeals to consider this jurisdictional question has held that CJA fee compensation determinations made by the district court are not appealable."); *Landano v. Rafferty*, 859 F.2d 301, 302 n.2 (3d Cir. 1988) (per curiam) ("The provision for limited review by the Chief Judge of the Circuit of vouchers approved by a district judge may be read to exclude by negative implication other forms of review of district judge action.").

Section 3599 is a "spin[] off" of the CJA, *Martel*, 132 S. Ct. at 1285, and provides for a similar process to review funding decisions. Accordingly, § 3599 should read *in pari materia* with the CJA. *See United States v. Stewart*, 311 U.S. 60, 64 (1940). This interpretive principle is especially applicable when, as here, the two statutes adopt a single consistent vocabulary in reference to the same subject matter. *Compare* 18 U.S.C. § 3006A(e)(3), *with id.* § 3599(g)(2). If CJA funding determinations are not appealable, then it follows that § 3599 funding determinations, which were modeled after the CJA, are also not appealable.[13]

The Tenth Circuit reached this very conclusion. In *Rojem*, the district court denied a funding request for investigative assistance under § 3599 because it "determined the requested amounts were *not reasonably necessary for the matter then before it*." 655 F.3d at 1202. The Tenth Circuit dismissed the petitioner's appeal of this decision, concluding that it was no different than a dispute over a CJA fee determination, which is administrative and not reviewable. *Id.* For the same reason, appellate courts lack jurisdiction to review funding decisions under § 3599(f). At the very least, it is an issue the Court will have to confront and resolve before reaching the second question presented.

2. Petitioner's arguments are premised on the notion that *Martinez* and *Trevino* have opened the door to investigation and discovery in the federal habeas context when the cause for a procedural default is the ineffective assistance of state habeas counsel. Pet. 38-39. But

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[13] Notably, Congress enacted the law currently codified in § 3599 in 1988 (*Martel*, 132 S. Ct. at 1284; Pub. L. 100-690, 102 Stat. 4181 (Nov. 18, 1988)), after several circuits had held that fee determinations under the nearly identical § 3006A were not appealable. *See, e.g.*, *Landano*, 859 F.2d at 302; *United States v. Rodriguez*, 833 F.2d 1536, 1537-38 (11th Cir. 1987) (per curiam).

§ 2254(e)(2), he will be unable to introduce his new evidence in court, rendering any further investigation futile.

C. The Fifth Circuit did not err in concluding that petitioner's ineffective-assistance claim lacked merit.

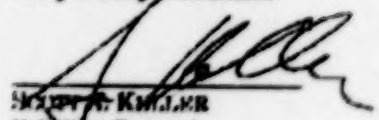
Finally, there was no error in the Fifth Circuit's conclusion that petitioner's ineffective-assistance-of-trial-counsel claim failed on the merits. The court assumed arguendo that petitioner could prove that he was addicted to drugs and alcohol at the time of the murder and that he was in the early stages of schizophrenia, but still concluded that the jury likely would have sentenced him to death regardless.

Although respondent has not seen petitioner's sealed ex parte § 3599(f) motion (Pet. App. G) and cannot therefore comment on it specifically, petitioner's briefing identifies a few topics on which he seeks further investigation.[14] First, much of his information appears to be derived from family members—the very individuals that petitioner affirmatively told his trial counsel not to contact. Pet. 29-30. As the state courts, district court, and Fifth Circuit have held, it is not ineffective assistance to follow a client's wishes with regard to mitigation evidence. *See Schriro*, 550 U.S. at 475 ("If Landrigan issued such an instruction [not to present mitigating evidence], counsel's failure to investigate further could not have been prejudicial under *Strickland*."); *Taylor v. Horn*, 504 F.3d 416, 455 (3d Cir. 2007).

Further, some of the testimony petitioner now seeks to investigate appears contrary to the evidence uncovered by state habeas counsel. *Compare* Pet. 29 (referring to evidence of

[14] Respondent preserves all arguments that could be made based on the contents of this sealed ex parte § 3599(f) motion.

Respectfully submitted.



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NO. 16-6795 (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS M. AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI 1

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S *RHINES* HOLDING 1

A. The Anticipatory Default Was Debatable Because It Was Wrong. 1

B. 28 U.S.C. § 2244(b) Does Not Bar The Siegler Memo Claims. 2

C. 28 U.S.C. § 2244(d) Does Not Bar The Siegler Memo Claims. 5

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S SUBSTANTIAL-NEED RULE. 6

A. The Circuit Split Over The Substantial-Need Standard Is Real. 7

B. There Is Appellate Jurisdiction Over Orders Denying § 3599(f) Services. 10

C. 28 U.S.C. § 2254(e)(2) Is Not a Vehicle Problem. 13

CONCLUSION AND PRAYER FOR RELIEF 15

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Page(s)

CASES

Ayestas v. Stephens, 817 F.3d 888 (5th Cir. 2016) 1, 7
Ayestas v. Stephens, 826 F.3d 214, 215 (5th Cir. 2016) (mem.) 2
Ayestas v. Stephens, No. H-09-2999, 2014 WL 6606498 (S.D. Tex. Nov. 18, 2014) 7
Blystone v. Horn, 664 F.3d 397 (3d Cir. 2011) 3-4
Buck v. Davis, No. 15-8049 (Feb. 22, 2017) 1, 7
Burris v. Parke, 130 F.3d 782 (7th Cir. 1997) 7
Canales v. Stephens, 765 F.3d 551 (5th Cir. 2014) 13, 14
Christeson v. Roper, 135 S. Ct. 891 (2015) 11
Curry v. United States, 307 F.3d 664, 665 (7th Cir. 2002) 4
Day v. McDonough, 547 U.S. 198 (2006) 6
Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014) 14
Edwards v. Roper, 688 F.3d 449 (8th Cir. 2012) 12
Fautenberry v. Mitchell, 572 F.3d 267 (6th Cir. 2009) 12
Feldberg v. Quechee Lakes Corp., 463 F.3d 195 (2nd Cir. 2006) 5
Foley v. White, 835 F.3d 561 (6th Cir. 2016) 8
Gonzales v. Crosby, 545 U.S. 524 (2005) 3
Harbison v. Bell, 556 U.S. 180 (2009) 11
Howard v. United States, 533 F.3d 472 (6th Cir. 2008) 4
Landano v. Rafferty, 859 F.2d 301 (3d Cir. 1988) 12
Martel v. Clair, 565 U.S. 648 (2012) 10, 11
Matthews v. White, 807 F.3d 756 (6th Cir. 2015) 8
(Michael) Williams v. Taylor, 529 U.S. 420 (2000) 14, 15
Murphy v. Stephens, No. 3:09-cv-1368-L-BN, 2014 W 4771859 (N.D. Tex Sept. 25, 2014) 14
Ray v. Clements, 700 F.3d 993 (7th Cir. 2012) 6
Rojem v. Workman, 655 F.3d 1199 (10th Cir. 2011) 12
United States v. French, 556 F.3d 1091 (10th Cir. 2009) 12

TABLE OF AUTHORITIES (cont.)

Page

United States v. Pedraza, 466 F.3d 932 (10th Cir. 2006) 4
Ward v. Stephens, 777 F.3d 250 (5th Cir. 2015) 11-12
Whab v. United States, 408 F.3d 116 (2d Cir. 2005) 4
Wilkins v. Davis, No. 16-723, 2017 WL 103565 (Jan. 11, 2017) 9
Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998) 9

CONSTITUTIONS, STATUTES AND RULES

18 U.S.C. § 3006A 10
18 U.S.C. § 3006A(e)(1) 10
18 U.S.C. § 3599 10
18 U.S.C. § 3599(f) ..... passim
18 U.S.C. § 3599(g)(2) 13
28 U.S.C. § 1254 ..... 11, 13
28 U.S.C. § 1291 ..... 11, 13
28 U.S.C. § 2244(b) 5
28 U.S.C. § 2244(b)(2) 2
28 U.S.C. § 2244(b)(3) 2, 3
28 U.S.C. § 2244(d)(1)(B) 6
28 U.S.C. § 2244(d)(1)(D) 6
28 U.S.C. § 2254(e)(2) 13, 14
FED. R. CIV. P. 7(b)(1) 5
FED. R. CIV. P. 15(c)(1)(B) 5
FED. R. CIV. P. 59(d) 3
FED. R. CIV. P. 59(e) 3, 4, 5
FED. R. CIV. P. 60(b) 4
Rules Governing § 2254 Cases in the United States District Courts, Rule 5 6

TABLE OF AUTHORITIES (cont.)

Page

TEX. CODE CRIM. PROC. art. 11.071 § 5(a) 2
TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1) 2

OTHER AUTHORITIES

Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure § 34.3 n.21 (7th ed. 2016) 4

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S *RHINES* HOLDING.

The Supreme Court just observed, in a case involving this same District Attorney's Office: "[T]his is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *See* Opinion at 13, *Buck v. Davis*, No. 15-8049 (Feb. 22, 2017). Mr. Ayestas does not, as the Director assumes, argue that there is a circuit split on the standard for a *Rhines* stay. The first Question Presented is worthy of certiorari for other reasons, not the least of which involves the "toxin[]" of blatant discrimination. *See id.* at 19.

A. The Anticipatory Default Holding Was Debatable Because It Was Wrong.

Stripped of its legalese, the Director's position is that the TCCA would find Mr. Ayestas at fault because his defense lawyers did not obtain the discriminatory memo over which the State claimed privilege. In a breathtaking concession warranting summary reversal, the BIO expressly states that "the fact that [the Siegler Memo] is privileged explains why it was not voluntarily turned over to [Mr. Ayestas's] counsel during the criminal trial." BIO at 18 n.10. To be clear: *The Director is expressly conceding that the Siegler Memo was unavailable to trial counsel.*

Otherwise, the anticipatory default position is a moving target. The Fifth Circuit initially held that the TCCA would refuse the claims because the post-conviction lawyers did not discover the Siegler Memo before December 2014. *See Ayestas v. Stephens*, 817 F.3d 888, 900-901 (5th Cir. 2016). Confronted with the

plain language of TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1)—which bars consideration of claims available on the "date the applicant filed the previous application"—the Fifth Circuit amended its opinion to predict that the TCCA would find *trial counsel* at fault for failing to obtain the Siegler Memo. *See Ayestas v. Stephens*, 826 F.3d 214, 215 (5th Cir. 2016) (mem.). Here, *having expressly conceded that the Siegler Memo was unavailable to trial counsel*, the Director attempts to revive the position abandoned by the Fifth Circuit. BIO at 18 (phrasing Mr. Ayestas' obligation as one to show why the memo was "unavailable until 2014"). To repeat the point that caused the Fifth Circuit to abandon the Director's position: the TCCA asks only whether the claim was unavailable on the "date [he] filed the previous application."

As a secondary matter, the Director misinterprets Mr. Ayestas's adequacy analysis as an argument that art. 11.071 § 5(a) is generally an inadequate procedural ground. The point is different—by anticipatorily imposing a procedural bar instead of waiting for the TCCA to apply the state statute, the lower courts deprived Mr. Ayestas of the opportunity to avoid or excuse default. If the TCCA ignored art. 11.071 § 5(a)(1)'s reference to the "date [he] filed the previous application," then the state ground would not be "firmly established and regularly followed." Pet. at 24.

B. 28 U.S.C. § 2244(b) Does Not Bar The Siegler Memo Claims.

The first vehicle problem asserted by the Director is that using Rule 59 to incorporate Siegler Memo litigation is the equivalent of a "successive petition" under 28 U.S.C. § 2244(b)(2), and that the Siegler Memo Claims therefore require circuit authorization under § 2244(b)(3). The district court did not in fact transfer the case

in accordance with the successive-petition rules, and the Fifth Circuit rejected the Director's jurisdictional position. This case does not involve certiorari review of an order denying authorization under § 2244(b)(3), so this Court's appellate jurisdiction is unimpaired. There is only a vehicle problem if this Court reversed the Fifth Circuit and imposed a jurisdictional rule no other appeals court entertains: that the district court lacks original jurisdiction to consider claims in a Rule 59 posture.

The Fifth Circuit refused to analyze the Siegler Memo litigation under § 2244(b) because, appropriately presented under Rule 59, it was not successive. In district court, Mr. Ayestas sought the *Rhines* stay in conjunction with an amendment 23 days after he discovered the Siegler Memo, while a timely Rule 59 motion was pending. He proposed three Rule 59 pathways through which the Court could grant leave to amend. He suggested that the Court: (1) grant the first Rule 59 motion and then grant leave to amend his petition to include the new claims; (2) exercise its Rule 59(d) authority to set aside the judgment on grounds other than those raised in the first Rule 59(e) motion; or (3) treat the Supplement to the first Rule 59(e) motion as a second Rule 59(e) motion, and set aside the judgment. *See* Pet'r's Mot. for Leave to Amend Original Pet. For Writ of Habeas Corpus at 2-3, *Ayestas v. Stephens*, No. 4:09-cv-2999 (S.D. Tex. Jan. 9, 2015) (No. 54). The Director argues that all three Rule 59 mechanisms should be treated as Rule 60 motions and as successive petitions under *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

No circuit, other than the Fifth, appears to entertain the idea that Rule 59(e) motions containing new content are successive petitions. *See, e.g., Blystone v. Horn*,

664 F.3d 397, 414 (3d Cir. 2011) ("[W]e cannot logically subject a Rule 59(e) motion to the statutory limitations imposed upon second or successive collateral attacks on criminal judgments because * * * it is part and parcel of the petitioner's one full opportunity to seek collateral review."); *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) ("The purposes behind Rule 59(e), as well as the mechanics of its operation, counsel in favor of the nonapplicability of second-or-successive limitations," even if the motion advances a claim.); *Curry v. United States*, 307 F.3d 664, 665 (7th Cir. 2002) (holding that Rule 59(e) motions are not "affected by the statutory limitations on successive collateral attacks on criminal judgments"); *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005) ("[S]o long as appellate proceedings * * * remain pending when a subsequent petition is filed, the subsequent petition does not come within [the successive petition provisions]."); *see also* Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure § 34.3 n.21 (7th ed. 2016) ("A Civil rule 59(e) motion is categorically exempt from the successive petition rules."). The Tenth Circuit case the Director invokes actually refers to a 59(e) motion in which the inmate moved to reconsider a Rule 60(b) motion already treated as a successive petition. *See United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir. 2006) (cited in BIO at 19).

The Director's fallback position is that the Fifth Circuit erred because *this particular* Rule 59(e) motion should be treated as a successive petition under some previously unspecified exception to the general rule that a new Rule 59(e) motion made during the pendancy of a timely Rule 59(e) motion is itself timely. BIO at 19.

According to the Director, that general rule is limited by a novel "relation-back" exception, which, she argues, Mr. Ayestas does not satisfy. In the Second Circuit case the BIO cites on page 19, *Feldberg v. Quechee Lakes Corp.*, 463 F.3d 195, 197 (2nd Cir. 2006) (per curiam), the court did not allow a subsequent Rule 59(e) motion to extend the period for appealing the judgment when the initial Rule 59(e) motion was simply a placeholder "provid[ing] no ground for altering or amending the district court's order dismissing the complaint." *Id.* The placeholder motion did not toll the time to appeal because it did not "state with particularity" the grounds for post-judgment relief under FRCP 7(b)(1). *See id. Feldberg* literally has nothing to do with the theory the Director suggests. If a novel relation-back rule exists, then Mr. Ayestas satisfies it because the Siegler Memo Claims arise out of the same common nucleus of operative facts as the Rule 59(e) Motion. *Cf.* FRCP 15(c)(1)(B) (defining "transactional" test for relation-back of pleading amendments).

The BIO includes two sentences suggesting that the mandate rule bars jurisdiction under 28 U.S.C. § 2244(b). BIO at 20. The Fifth Circuit indeed explained that the Siegler Memo litigation was outside the scope of its mandate, but that explanation was not a successive-petition holding. The Fifth Circuit held that the mandate rule, of its own force, precluded consideration in the district court. The mandate rule is addressed on pages 25-26 of the Certiorari Petition.

C. 28 U.S.C. § 2244(d) Does Not Bar The Siegler Memo Claims.

The Director asserts that the statute of limitations is vehicle problem. Should the Director plead the limitations defense when the time comes, Mr. Ayestas will

obviously assert that his limitation period for the Siegler Memo claims is one that commences under either 28 U.S.C. § 2244(d)(1)(B) or (d)(1)(D), which specify:

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; [or * * *] (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Mr. Ayestas has not pleaded his claims, the Director has not pleaded a limitations defense disputing the period's commencement under Subsections (1)(B) and (1)(D), and there has been no fact development on the question whatsoever. The limitations period is not a vehicle problem; it is an affirmative defense the Director hopes to win should the litigation return to district court.

Nor is the limitations provision a "jurisdictional" bar. *See Day v. McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense, the State acknowledges, is not 'jurisdictional' * * *.") It is an affirmative defense that is specified by name in the habeas rules governing state-inmate petitions. *See id.* at 208-09 (repeatedly identifying limitations rule as an affirmative defense); Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") (specifying which limits on habeas relief must be set out in the State's answer). The nonjurisdictional status of the limitations period is well established, reflected by the Director's failure to cite any authority suggesting otherwise. *See Ray v. Clements*, 700 F.3d 993, 1006 (7th Cir. 2012) ("It is well-settled that AEDPA's statute of limitations is a nonjurisdictional affirmative defense.").

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S SUBSTANTIAL-NEED RULE.

The district court determined that the evidence before it did not "demonstrate" a *Wiggins* violation, and, for that reason, it refused funding for § 3599(f) investigative services necessary to develop and plead the claim. The Fifth Circuit "interpreted" that holding as a finding that, even if Mr. Ayestas were to develop the claim, the result would be a nonmeritorious challenge.[1] *Ayestas*, 817 F.3d at 896. As a result, the Fifth Circuit held that, notwithstanding *Wiggins* deficiency, there was no "substantial need" for investigative services to explore prejudice.

A. The Circuit Split Over The Substantial-Need Standard Is Real.

The Director repeatedly insists that there is no circuit split because no appeals court authorizes § 3599(f) services for meritless claims. BIO at 24, 26-27. Courts indeed refuse services in support of meritless claims, but that observation obviously sidesteps the subject of the circuit split: at what state of factual development a federal court may declare a claim "meritless." For example, in the Seventh Circuit, the standard for authorizing § 3599(f) services would not be whether Mr. Ayestas's existing evidence showed "substantial need" by proving prejudice, but whether he had met the much lower threshold of establishing a "preliminary showing" that expert services are reasonably necessary to litigate that position. *See Burris v. Parke*, 130 F.3d 782, 784 (7th Cir. 1997).

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[1] The district court held that Mr. Ayestas "fail[ed] to demonstrate" a *Wiggins* violation. *Ayestas v. Stephens*, No. H-09-2999, 2014 WL 6606498, at *5 (S.D. Tex. Nov. 18, 2014). This Court just held that it will not indulge the fiction that such clarity indicates anything other than a merits disposition on the underlying question. *See* Opinion at 13-14, *Buck v. Davis*, No. 15-8049 (Feb. 22, 2017).

Indeed, the Fifth Circuit split with the Fourth and Sixth Circuits is explicit. Pet. at 34-35. The Director's primary argument is that the split is immaterial because *Ayestas* would have turned out the same way in both jurisdictions—that the Fifth Circuit "*essentially* determined that there was no substantial question" about *Wiggins* prejudice. BIO at 25 (emphasis added). To the contrary, had Mr. Ayestas made his § 3599(f) request under the Fourth and Sixth Circuit's less stringent standard—expressly distinguished by the Sixth Circuit from the Fifth Circuit's substantial-need test—the § 3599(f) services would have been authorized. The Fifth Circuit did not "essentially" find the absence of a substantial question, because it did not reach that issue. Instead, it only considered Mr. Ayestas' motion under the "heightened standard" demanded by the substantial-need test. *Matthews v. White*, 807 F.3d 756, 760 n.2 (6th Cir. 2015) (noting that the substantial need standard exceeds what is contemplated by the "reasonable" language of the statute).

The Director further argues this case implicates no difference between the reasonable-necessity standards with citation to *Foley v. White*, 835 F.3d 561, 564 (6th Cir. 2016), explaining that the Sixth Circuit used the substantial-question test to deny funding there. BIO at 25. As reflected by the fact that Mr. Ayestas actually relies on *Foley* for his position (Pet. at 35), the Director's characterization omits the key distinctions. The *Foley* petitioner was not denied funding to develop a new record; he was denied funding because his "competency and mental health have been discussed, analyzed, and adjudged numerous times[]," creating an "expansive and detailed" record. *Foley*, 835 F.3d at 564. Mr. Ayestas, by contrast, seeks § 3599(f)

services to create the mental health and substance abuse record in the first place. Quite unlike the inmate in *Foley*, Mr. Ayestas is not seeking to fund a duplicative search for information already considered on the merits. In the Fourth Circuit, a "substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without it." *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998).

The remainder of the BIO briefing on the circuit split involves stray observations about different pieces of authority in the Certiorari Petition. For example, the Director attempts to paper over the circuit split on the ground that some of the Sixth Circuit cases involved § 3599(f) services for clemency proceedings. Although § 3599(f) services that are reasonably necessary for post-conviction litigation differ from those reasonably necessary for clemency, the fact that a substantial-question standard requires less than a substantial-need standard remains the same. The substantial-need rule does not refer to one quantum of necessity for post-conviction litigation and another for clemency proceedings. If the distinction mattered to the Sixth Circuit, its aggressive criticism of the Fifth Circuit's substantial-need standard for post-conviction services makes no sense.[2] Moreover, the cases from the other jurisdictions aligning themselves with the Sixth Circuit and against the Fifth do *not* involve clemency.

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[2] Even the Director fails to operate as though this distinction matters. At least one of the cases she cites to show that this Court has declined certiorari on "this issue" is a clemency case out of the Fifth Circuit. *See* BIO at 24 (citing *Wilkins v. Davis*, No. 16-723, 2017 WL 103565 (Jan. 11, 2017)).

The Director also suggests that cases discussing the parallel provision for criminal trials, 18 U.S.C. § 3006A, are irrelevant because "a court [applying § 3006A] could not decide that a defendant was guilty and deny investigative funding." BIO at 25-26. Setting aside that a federal judge presiding over a trial obviously has discretion to deny absurd investigative requests, the distinction between the two different Criminal Justice Act ("CJA") provisions (18 U.S.C. §§ 3006A & 3599) is one without a difference. First, § 3599 and § 3006A are part of the same statutory framework, codified in different parts of the U.S. Code. Section 3599, which has rules specific to death penalty cases, was enacted as part of the CJA and as an offshoot of § 3006A. *See Martel v. Clair*, 565 U.S. 648, 658-59 (2012). To the extent that there is any difference in the application of the two provisions, § 3599 is interpreted as *more* protective of inmates seeking resources. *See id.* at 659 (recognizing that § 3599 was enacted to provide capital defendants with "enhanced" protections including more experienced counsel, higher rates of compensation, and more money for expert and investigative services). Any distinctions between the standards for authorizing § 3599(f) services in capital cases and the standards for authorizing them under § 3006A cuts *against* the Director, not for her. Second, the fact that § 3006A(e)(1) provides that services "shall" be provided and § 3599(f) provides that they "may" be provided makes not a lick of difference to the meaning of the substantive standard—necessity—used to decide whether services are awarded.

B. There Is Appellate Jurisdiction Over Orders Denying § 3599(f) Services.

The Director asserts that this Court lacks appellate jurisdiction over orders denying § 3559(f) services—i.e., that the absence of express language providing for appeal of § 3599(f) orders should be construed as a limit on the otherwise applicable grant of plenary appellate power to the federal appeals courts under 28 U.S.C. § 1291 (and to this Court under 28 U.S.C. § 1254). Such an interpretation seems quite strained in light of the portion of § 3599(f) requiring that "[a]ny [ex parte request for services] shall be transcribed and made a part of the record available for appellate review." Why would § 3599(f) require materials be prepared for appeal of a § 3599(f) order if such appeals are barred?

No court has ever endorsed the position the Director takes, which is also inconsistent with basic canons of statutory construction requiring that there be an express provision ousting superior courts of the more general jurisdiction they exercise by way of 28 U.S.C. §§ 1254 & 1291. This Court would certainly be shocked to learn that standards for considering the *amount* of compensation implicitly limited the appellate jurisdiction of federal courts to review any order made under § 3599. After all, this Court has exercised jurisdiction over § 3599 orders on a number of occasions. *See, e.g.*, *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) (reviewing circuit disposition of appeal on order denying substitution of counsel under § 3599(e)); *Martel v. Clair*, 565 U.S. 648, 658-59 (2012) (same); *Harbison v. Bell*, 556 U.S. 180, 185-86 (2009) (determining that § 3599 mandates provision of counsel in state clemency proceedings). Federal appeals courts—including the Fifth Circuit—routinely review orders denying § 3599(f) services. *See, e.g.*, *Ward v. Stephens*, 777 F.3d 250,

265–66 (5th Cir. 2015) (reviewing denial of § 3599(f) services for abuse of discretion); *Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012) (same); *Fautenberry v. Mitchell*, 572 F.3d 267, 268-69 (6th Cir. 2009) (same).

The cases the Director cites for the proposition that § 3599 decisions are unreviewably administrative are all about the *amount of fees or other compensation* for counsel or services already provided under the CJA—which are completely different issues from whether the underlying § 3599(f) request is denied in advance. *See* BIO at 27 (citing *United States v. French*, 556 F.3d 1091, 1093 (10th Cir. 2009); *Landano v. Rafferty*, 859 F.2d 301, 302 n.2 (3d Cir. 1988). The Director's emphasis on *Rojem v. Workman*, 655 F.3d 1199 (10th Cir. 2011), is particularly stunning in light of the clarity with which the opinion speaks to the distinction between appealing a denial of funds versus appealing the amount approved:

> Rather than a complete denial of counsel, * * * this appeal boils down to a dispute about the district court's decision to award an amount less than the requested amount for representation in the pending § 2254 proceeding. This court has determined that such district court CJA fee determinations are not appealable orders. * * * [B]ecause it all comes down to the fact that counsel disagrees with the *amount* of the payment, this court lacks jurisdiction to hear this appeal.

Id. at 1202 (10th Cir. 2011) (alterations, citations, and internal quotation marks omitted; emphasis in original).

Setting aside the citation to the string of that irrelevant authority about appealing the *amount* of compensation—most of which involves the parallel CJA provisions applicable for trial defendants in noncapital cases—the Director's argument consists, it seems, of the observation that "Section 3599 closely circumscribes the

review available for funding determinations and does not itself provide for appellate review of the denial of funds." BIO at 27. Subsections (f) and (g)(2)—the two provisions cited by the Director—certainly do not impose limits on appellate review of orders denying § 3599 counsel or services. Subsection (f) is the standard that a *trial court* uses to determine entitlement to such services. Subsection (g)(2) requires that the Chief Justice of the pertinent circuit (or the Chief's delegee) authorize payment in excess of $7,500.

There is nothing in the text of the statute, this Court's decisions, or case law anywhere that supports the Director's theory that § 3599 ousts superior federal courts of appellate jurisdiction that they enjoy under §§ 1254 & 1291. The Director is attempting to present cases involving the *amount* of after-the-fact payment (usually to attorneys) with cases about whether § 3599(f) requests are denied.

C. 28 U.S.C. § 2254(e)(2) Is Not a Vehicle Problem.

The Director further asserts as another downstream vehicle problem that 28 U.S.C. § 2254(e)(2) would bar introduction of any evidence that federal habeas counsel discovers. BIO at 29-30. Once again, this is not a vehicle problem, but an attempt to present as law an idiosyncratic interpretation of § 2254(e)(2) that even courts in the Fifth Circuit have found too extreme. After *Martinez* and *Trevino*, the Fifth Circuit affirmed the order denying § 3599(f) services, but did not breathe a word about the § 2254(e)(2) conditions for an evidentiary hearing. In fact, no Fifth Circuit decision adopts her preferred § 2254(e)(2) interpretation—and the Fifth Circuit expressly rejected it in *Canales* v. *Stephens*, 765 F.3d 551 (5th Cir. 2014).

See *id.* at 571 n.2 ("Texas argues that if we decide to remand any claims to the district court, we should deny Canales the opportunity to have an evidentiary hearing. We decline to take this step * * *.").[3]

Setting aside that the question is premature, the Director interprets § 28 U.S.C. § 2254(e)(2) incorrectly. It restricts an evidentiary hearing "on the claim" if a state inmate "failed to develop the factual basis of a claim in State court proceedings." In *(Michael) Williams* v. *Taylor*, 529 U.S. 420 (2000), this Court held that, under § 2254(e)(2), an inmate only "fail[s] to" develop a claim's factual basis if the inmate is "at fault." See *id.* at 433. *Williams* held that the same conditions establishing cause for a procedural default will also establish that an inmate did not "fail[] to develop" the factual basis of a claim in state court. 529 U.S. at 433. If state post-conviction performance excuses Mr. Ayestas' default, then it also disables any § 2254(e)(2) bar to federal evidentiary hearings. *See Dickens* v. *Ryan*, 740 F.3d 1302, 1321-22 (9th Cir. 2014) (en banc) (holding that a successful showing of *Martinez*

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[3] Federal district courts in Texas have already concluded that the limitation of § 2254(e)(2) should not apply to claims that fall within the *Martinez* exception. *See, e.g.*, *Murphy* v. *Stephens*, No. 3:09-cv-1368-L-BN, 2014 WL 4771859, at *2 (N.D. Tex. Sept. 25, 2014) (reasoning that a court invoking § 2254(e)(2) to bar introduction of IATC evidence on claims that *Martinez* excuses "would defeat * * * [Martinez's] stated purposes"); Order Cancelling Referral And Setting Hearing at 4, Dkt. 66, *Garcia* v. *Stephens*, No. 3:06-cv-02185 (N.D. Tex. Jan. 31, 2014) (granting evidentiary hearing on procedurally defaulted IATC claim).

cause disabled § 2254(e)(2) because the inmate "'was unable to develop his claim in state court despite diligent effort'") (quoting *Williams*, 529 U.S. at 437).[4]

* * *

Mr. Ayestas does not argue that *Martinez* requires courts to authorize § 3599(f) services for any claim, without respect to merit. Mr. Ayestas has shown deficiency, and the question is what the underlying deficiency kept out of the jury's reach. That information can only be known with a measure of investigation. The Director's § 3599(f) position reduces to the circular argument that a court can know that deficient performance did not prejudice the sentencing outcome without knowing what evidence the deficient investigation failed to discover.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Ayestas prays that this Court grant a writ of certiorari to resolve the Questions Presented.

February 23, 2017 Respectfully Submitted,

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[4] The Director's argument about the underlying merits of the claim—specifically, *Wiggins* prejudice—are sufficiently addressed in the Certiorari Petition. Pet. for a Writ of Certiorari at 37-40, *Ayestas v. Davis*, No. 16-6795 (Nov. 7, 2016).

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NO. 14-6992 (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS M. AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Lee B. Kovarsky, hereby certify that true and correct electronic versions of this Reply in Support of a Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on February 23, 2017 via e-mail to:

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/s/ Lee B. Kovarsky
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1997), but there is no indication that a determination that an underlying claim lacks merit would still result in funding.

B. Petitioner's funding claim also faces jurisdictional and statutory obstacles.

1. To reach the second question presented, the Court would have to confront the predicate question whether there is appellate jurisdiction over appeals of the denial of funding under § 3599(f). *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976) (stating that the Court has an obligation to question its own appellate jurisdiction). Section 3599 closely circumscribes the review available for funding determinations and does not itself provide for appellate review of the denial of funds. 18 U.S.C. § 3599(f), (g)(2).

Congress has granted courts of appeals jurisdiction to review "final decisions" of the district courts. 28 U.S.C. § 1291. The courts of appeals, however, have held that § 1291 "necessarily refers to final decisions of a judicial character, not to administrative actions . . . outside the scope of the litigative function." *In re Baker*, 693 F.2d 925, 926-27 (9th Cir. 1982); *see, e.g.*, *Wilkins v. Davis*, 832 F.3d 547, 558-59 (5th Cir. 2016); *In re Pickett*, 842 F.2d 993, 995 (8th Cir. 1988); *Bense v. Starling*, 719 F.2d 241, 244 (7th Cir. 1983). Thus, for example, the courts of appeals are unanimous that fee determinations made under the Criminal Justice Act (18 U.S.C. § 3006A) are administrative acts not reviewable under § 1291. *United States v. French*, 556 F.3d 1091, 1093 (10th Cir. 2009) ("Every circuit court of appeals to consider this jurisdictional question has held that CJA fee compensation determinations made by the district court are not appealable."); *Landano v. Rafferty*, 859 F.2d 301, 302 n.2 (3d Cir. 1988) (per curiam) ("The provision for limited review by the Chief Judge of the Circuit of vouchers approved by a district judge may be read to exclude by negative implication other forms of review of district judge action.").

Section 3599 is a "spin[] off" of the CJA, *Martel*, 132 S. Ct. at 1285, and provides for a similar process to review funding decisions. Accordingly, § 3599 should read *in pari materia* with the CJA. *See United States v. Stewart*, 311 U.S. 60, 64 (1940). This interpretive principle is especially applicable when, as here, the two statutes adopt a single consistent vocabulary in reference to the same subject matter. *Compare* 18 U.S.C. § 3006A(e)(3), *with id.* § 3599(g)(2). If CJA funding determinations are not appealable, then it follows that § 3599 funding determinations, which were modeled after the CJA, are also not appealable.[13]

The Tenth Circuit reached this very conclusion. In *Rojem*, the district court denied a funding request for investigative assistance under § 3599 because it "determined the requested amounts were *not reasonably necessary for the matter then before it.*" 655 F.3d at 1202. The Tenth Circuit dismissed the petitioner's appeal of this decision, concluding that it was no different than a dispute over a CJA fee determination, which is administrative and not reviewable. *Id.* For the same reason, appellate courts lack jurisdiction to review funding decisions under § 3599(f). At the very least, it is an issue the Court will have to confront and resolve before reaching the second question presented.

2. Petitioner's arguments are premised on the notion that *Martinez* and *Trevino* have opened the door to investigation and discovery in the federal habeas context when the cause for a procedural default is the ineffective assistance of state habeas counsel. Pet. 38-39. But

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[13] Notably, Congress enacted the law currently codified in § 3599 in 1988 (*Martel*, 132 S. Ct. at 1284; Pub. L. 100-690, 102 Stat. 4181 (Nov. 18, 1988)), after several circuits had held that fee determinations under the nearly identical § 3006A were not appealable. *See, e.g.*, *Landano*, 859 F.2d at 302; *United States v. Rodriguez*, 833 F.2d 1536, 1537-38 (11th Cir. 1987) (per curiam).

other relevant doctrines still limit these claims. For example, a federal habeas petitioner must still comply with AEDPA's limitations on federal review of state habeas decisions.

To begin, *Martinez* does not require federal courts to await development of a full evidentiary record before determining that a claim is insubstantial or would be rejected on the merits. 566 U.S. at 15-16 (anticipating that States would argue that the underlying claim lacked merit). The Court in *Martinez* believed that addressing cause and prejudice for ineffective assistance of counsel would "not . . . put a significant strain on state resources." *Id.* at 15. Finding cause and prejudice under *Martinez* and *Trevino* simply allows the district court to hear the underlying ineffective-assistance claim. To that extent, petitioner received all the relief he was due under *Martinez* and *Trevino*—the lower courts considered the merits of his ineffective-assistance-of-trial-counsel claim and determined that he would fail *Strickland*'s prejudice prong, even with further investigation. Pet. App. A11, B2, C12.

Even if the district court authorized funding for further investigation, petitioner would still need to meet AEDPA's standards before introducing that evidence. Under 28 U.S.C. § 2254(e)(2), petitioner would have to demonstrate that the "factual predicate . . . could not have been previously discovered through the exercise of due diligence" and that "no reasonable factfinder would have found the applicant guilty." But petitioner's entire ineffective-assistance claim is premised on his belief that the evidence of his substance abuse and mental illness could have and should have been discovered earlier. And he makes no argument that he is not guilty of the underlying offense. *Martinez* and *Trevino* may remove a procedural-default bar in certain circumstances, but they do not negate other limitations on habeas review imposed by AEDPA. If petitioner cannot meet the requirements of

§ 2254(e)(2), he will be unable to introduce his new evidence in court, rendering any further investigation futile.

C. The Fifth Circuit did not err in concluding that petitioner's ineffective-assistance claim lacked merit.

Finally, there was no error in the Fifth Circuit's conclusion that petitioner's ineffective-assistance-of-trial-counsel claim failed on the merits. The court assumed arguendo that petitioner could prove that he was addicted to drugs and alcohol at the time of the murder and that he was in the early stages of schizophrenia, but still concluded that the jury likely would have sentenced him to death regardless.

Although respondent has not seen petitioner's sealed ex parte § 3599(f) motion (Pet. App. G) and cannot therefore comment on it specifically, petitioner's briefing identifies a few topics on which he seeks further investigation.[14] First, much of his information appears to be derived from family members—the very individuals that petitioner affirmatively told his trial counsel not to contact. Pet. 29-30. As the state courts, district court, and Fifth Circuit have held, it is not ineffective assistance to follow a client's wishes with regard to mitigation evidence. *See Schriro*, 550 U.S. at 475 ("If Landrigan issued such an instruction [not to present mitigating evidence], counsel's failure to investigate further could not have been prejudicial under *Strickland*."); *Taylor v. Horn*, 504 F.3d 416, 455 (3d Cir. 2007).

Further, some of the testimony petitioner now seeks to investigate appears contrary to the evidence uncovered by state habeas counsel. *Compare* Pet. 29 (referring to evidence of

[14] Respondent preserves all arguments that could be made based on the contents of this sealed ex parte § 3599(f) motion.

poverty and dysfunction), *and* R.688 (referring to past head injuries), *with* R.5357 (describing a stable, middle-class background with no illnesses or injuries). Also, demonstrating that petitioner had a mental illness would have undermined state habeas counsel's arguments that trial counsel was ineffective for not having petitioner testify during his trial. R.5558 (arguing that trial counsel should not have feared putting petitioner on the stand because he was above average intelligence and an accomplished student).

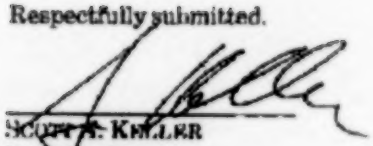
Moreover, evidence of substance abuse and mental illness is often just as likely to be considered an aggravating factor as it is a mitigating factor. *See, e.g., Wackerly v. Workman*, 580 F.3d 1171, 1178 (10th Cir. 2009); *Cannon v. Gibson*, 259 F.3d 1253, 1277-78 (10th Cir. 2001); *Royal v. Taylor*, 188 F.3d 239, 249 (4th Cir. 1999); *Waldrop v. Jones*, 77 F.3d 1308, 1313 (11th Cir. 1996); *Jones v. Page*, 76 F.3d 831, 846 (7th Cir. 1996); *see also Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.").

The Fifth Circuit correctly determined that the presentation of substance abuse evidence or evidence of mental illness would not have had a substantial likelihood of changing the jury's conclusion about petitioner's sentence. Consequently, petitioner cannot prove the prejudice prong of *Strickland*, and his ineffective-assistance-of-trial-counsel claim fails. As a result, his state habeas counsel was not ineffective, and the procedural bar remains firmly in place. It was not therefore "reasonably necessary" to fund any further investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.



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FEBRUARY 2017

FILED
JUN - 9 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-6795 (CAPITAL CASE)

IN THE

Supreme Court of the United States

CARLOS MANUEL AYESTAS,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice (Institutional Division),

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed November 7, 2016
Certiorari Granted April 3, 2017

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TABLE OF CONTENTS

APP'X	DOCUMENT	PAGE
A	Relevant Docket Entries, *Texas v. Ayestas*, No. 754409 (Harris Cnty. Distr. Ct., 230th Jud. Distr.)	1
B	Relevant Docket Entries, *Ex parte Carlos Manuel Ayestas*, No. WR-69,674-01 (Tex. Crim. App. Ct.)	13
C	Relevant Docket Entries, *Ayestas v. Texas*, No. AP-72,928 (Tex. Crim. App. Ct.)	16
D	Relevant Docket Entries, *Ayestas v. Thaler*, No. 4:09-cv-02999 (S.D. Tex.)	17
E	Relevant Docket Entries, *Ayestas v. Thaler*, No. 11-70004 (5th Cir.)	25
F	Relevant Docket Entries, *Ayestas v. Thaler*, No. 12-6656 (U.S.)	29
G	Relevant Docket Entries, *Ayestas v. Stephens*, No. 15-70015 (5th Cir.)	31
H	Capital Murder Summary Memorandum by Kelly Siegler (Sept. 19, 1995)	37

TABLE OF CONTENTS

APP'X	DOCUMENT	PAGE
I	Defendant's Trial Exhibits 1-3, Letters from Mae J. Martin to Probation Department (Dec. 1, 1996)	41
J	Charge of the Court on Guilt or Innocence (Harris Cnty. Distr. Ct., 230th Jud. Distr. July 9, 1997)	44
K	Verdict (Harris Cnty. Distr. Ct., 230th Jud. Distr. July 9, 1997)	58
L	Charge of the Court on Assessment of Punishment (Harris Cnty. Distr. Ct., 230th Jud. Distr. July 10, 1997)	59
M	Judgment & Sentence (Harris Cnty. Distr. Ct., 230th Jud. Distr. July 10, 1997)	71
N	Investigation Plan of Tena Francis (Feb. 17, 1998)	76
O	Affidavit of Zoila Corea (Oct. 16, 1998)	85
P	Affidavit of Xiomara Zelaya (Oct. 16, 1998)	95
Q	Affidavit of Blanca Zelaya (Oct. 16, 1998)	105
R	Direct Appeal Opinion, (Tex. Crim. App. Ct. Nov. 4, 1998)	115

TABLE OF CONTENTS

APP'X	DOCUMENT	PAGE
S	Letter from Francisco Perez, Ph.D., to Gary Hart (May 28, 2003)	139
T	TDCJ-CID Medical Records (Feb. 10, 2004)	141
U	Affidavit of Diana Olvera (Jan. 26, 2005)	147
V	Affidavit of Dennis Humberto Zelaya (Feb. 10, 2005)	153
W	Affidavit of Diana Olvera (Oct. 24, 2006)	156
X	Order adopting Respondent's Proposed Findings of Fact, Conclusions of Law (Harris Cnty. Dist. Ct. Feb. 18, 2008)	161
Y	State Habeas Order (Tex. Crim. App. Ct. Sept. 10, 2008)	199
Z	Memorandum Opinion and Order (S.D. Tex. Jan. 26, 2011)	201
AA	Final Judgment (S.D. Tex. Jan. 26, 2011)	238
BB	Order Denying Petitioner's Motion to Alter or Amend Judgment (S.D. Tex. Feb. 28, 2011)	239

TABLE OF CONTENTS

APP'X	DOCUMENT	PAGE
CC	Opinion (5th Cir. Feb. 22, 2012)	241
DD	Order Denying Petition for Rehearing (5th Cir. July 11, 2012)	257
EE	Order Granting Petition for a Writ of Certiorari, Vacating Judgment, and Remanding to the United States Court of Appeals for the Fifth Circuit (U.S. June 3, 2013)	259
FF	Judgment (U.S. July 5, 2013)	260
GG	Order Vacating and Remanding after *Trevino* (5th Cir. Jan. 30, 2014)	261
HH	Affidavit of Tena Francis (June 16, 2014)	264
II	Petitioner's Motion for Leave to File Ex Parte and Under Seal a Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f) (Nov. 3, 2014) **[REDACTED]**	271
JJ	Memorandum Opinion and Order (S.D. Tex. Nov. 18, 2014)	351
KK	Final Judgment (S.D. Tex. Nov. 18, 2014)	366

TABLE OF CONTENTS

APP'X	DOCUMENT	PAGE
LL	Order Denying Motion to Amend and Motion to Stay (S.D. Tex. Feb. 17, 2015)	367
MM	Memorandum Opinion and Order Denying Motion to Alter or Amend Judgment (S.D. Tex. Apr. 1, 2015)	373
NN	*Ayestas v. Stephens*, 817 F.3d 888 (5th Cir. 2016)	377
OO	*Ayestas v. Stephens*, 826 F.3d 214 (5th Cir. 2016)	398
PP	Order Granting Petition for Writ of *Certiorari* (U.S. Apr. 3, 2017)	400

APPENDIX A

RELEVANT DOCKET ENTRIES

IN THE 230TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

THE STATE OF TEXAS	§	
	§	
	§	Trial Court Cause No.
v.	§	754409
CARLOS MANUEL AYESTAS	§	
	§	

Date	Document
02/15/1996	Defendant's Motion for the Appointment of an Investigator, and Order of the Court
02/15/1996	Defendant's Motion for the Appointment of an Investigator, and Order of the Court
02/15/1996	Defendant's Motion for the Appointment of an Investigator, and Order of the Court
02/15/1996	Motion for Discovery of Punishment Evidence, and Orders of the Court
02/15/1996	Defendant's Motion to Discover State's Extraneous and/or Unadjudicated Acts of Misconduct to be Offered at Guilt or Punishment, and Order of the Court
05/15/1996	Motion for Discovery and Inspection of Evidence, and Orders of the Court

Date	Document
02/15/1997	Defendant's Motion for the Appointment of an Investigator, and Order of the Court
03/07/1997	Defendant's Motion for a Speedy Trial
05/23/1997	Demand for Individual Voir Dire, and Order of the Court
05/23/1997	Motion to Require the State to Reveal Agreements, and Order of the Court
05/23/1997	Motion to Discover Arrest and Conviction Records of Witnesses, and Order of the Court
05/23/1997	Motion to Compel Disclosure of Evidence Favorable to the Defendant, and Order of the Court
05/23/1997	Motion for Equal Access to Background Information on Prospective Jurors, and Order of the Court
05/23/1997	Motion to Suppress Identification, and Order of the Court
05/23/1997	Motion in Limine
05/23/1997	Motion to Introduce the Testimony of Defendant's Family and Friends Regarding their Feelings on the Prospect of a Death Sentence and the Impact an Execution Would Have on Them, and Order of the Court
05/23/1997	Motion to Limit State's Cross-Examination of Defendant to the Scope of the Direct, and Order of the Court

Date	Document
05/23/1997	Motion to Hold Unconstitutional V.A.C.C.P., Article 37.071 § 2(e) and (f) - Failure to Require Mitigation be Considered, and Order of the Court
05/23/1997	Motion to Hold Unconstitutional V.A.C.C.P., Article 37.071 § 2(e) and (f) - Burden of Proof, and Order of the Court
05/23/1997	Motion to Pound Specific Questions to Venireman Regarding the Burden of Proof on Special Issue, Mitigation, and Order of the Court
05/23/1997	Motion to Voir Dire on Parole Law - 40 Year Minimum, and Order of the Court
05/23/1997	Defendant's Motion to Present Written Questions to Jury Panel, and Order of the Court
05/23/1997	Defendant's Request to Utilize Peremptory Challenges Following Examination of the Entire Venire, and Order of the Court
05/23/1997	Motion for Jury List, and Order of the Court
05/23/1997	Motion for the Court to Direct Court Reporter to Take Voir Dire Examination of the Jury and Bench Conferences and all Final Arguments, and Order of the Court

Date	Document
05/23/1997	Motion for the Court to Direct Court Reporter to Take Voir Dire Examination of the Jury and Bench Conferences and all Final Arguments, and Order of the Court
05/23/1997	Motion for Hearing on Admissibility of Any Statement by Defendant Whether Written or Oral or Evidence Resulting from Same, and Order of the Court
05/23/1997	Motion to Discover the Portions of the Defendant's Statement Which the State Intends to Use at Time of Trial, and Order of the Court
05/23/1997	Motion to Inspect Premises, and Order of the Court
05/23/1997	Motion to View and Inspect Physical Evidence, and Order of the Court
05/23/1997	Motion to Disclose Existence of Any Testing Comparisons and Results Theret/of Conducted on Physical Evidence, and Order of the Court
05/23/1997	Defendant's Motion to Prevent Unfair Surprise During Trial, and Order of the Court
05/23/1997	Motion to Exclude Evidence of Unadjudicated Extraneous Offenses During the Punishment Phase, and Order of the Court
05/23/1997	Motion to Permit Voir Dire of Prospective Jurors on Mitigating Evidence, and Order of the Court

Date	Document
05/23/1997	Motion in Limine Character of the Complainant Victim Impact, and Order of the Court
05/23/1997	Motion to Preclude Prosecution from Seeking the Death Penalty, and Order of the Court
05/23/1997	Motion to Determine Constitutionality of 37.071 (2)(b)(2) - Parties Charge, and Order of the Court
05/23/1997	Defendant's Motion to Set Aside the Indictment (Unconstitutionality of Statute), and Order of the Court
05/23/1997	Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude Imposition of the Death Penalty, and Order of the Court
05/23/1997	Motion to Voir Dire Venireman on Victim Impact Testimony, and Order of the Court
05/30/1997	Notice of State's Intent to Use Extraneous Offenses and Prior Convictions for Impeachment and Punishment Purposes
06/02/1997	Indictment
06/02/1997	Order of Presentation of Indictments and Nobills
06/03/1997	Motion to Adopt and Transfer Motions Previously Filed Under Other Cause Number, and Order of the Court

Date	Document
06/11/1997	First Amended Notice of State's Intent to Use Extraneous Offenses and Prior Convictions for Impeachment and Punishment Purposes
06/12/1997	Motion in Limine
	* * *
07/02/1997	Second Amended Notice of State's Intent to Use Extraneous Offenses and Prior Convictions for Impeachment and Punishment Purposes
	* * *
07/02/1997	Capital Murder Jury Strike List
07/07/1997	Motion in Limine
07/09/1997	Charge of the Court on Guilt or Innocence, and Defendant's Exhibit No. 2
07/09/1997	Verdict
07/10/1997	Charge of the Court on Assessment of Punishment, and Defendant's Exhibit No. 3
07/10/1997	Request of the Jurors, and Defendant's Exhibit No. 4
07/10/1997	A Sealed Envelope Labeled: Court Exhibit No. 1 ***DO NOT UNSEAL WITHOUT COURT ORDER! SIGNED: JUDGE PRESIDING 230TH DISTRICT COURT***
07/10/1997	Judgment and Sentence

Date	Document
07/15/1997	Finding of Indigency and Desire for Appointment of Habeas Counsel, and Order of the Court
07/22/1997	Letter of Assignment to the Court of Criminal Appeals
07/24/1997	Motion for New Trial, and Order of the Court
07/31/1997	An Inventory List of Exhibits

Relevant Court Proceeding Entries

06/03/1997 The Defendant, Ayestas, appeared in person with Counsel Diana Olvera & Connie Williams. Bill Hawkins, & Don Smythe appeared for the State.
Interpreter: Lynda Kroneman
Court Reporter: Jennifer Messinger
Judge Presiding: Bob Burdette

At 10:04 am Court came to order. Motions were heard, ruled on and read into the record. The defendant was duly arraigned to which he pled Not Guilty. Court was adjourned at 10:48 am.

* * *

Date	Document
06/04/1997	**General Orders of the Court**: At 10:01 am Court came to order. Witnesses were sworn and testimony began on the Motion to Suppress Identification. At 10:22 am the State rests. Defense testimony began at this time. At 10:40 am Defense rests. Both sides rest and close. Defense made brief arguments. Court denied said Motion. Court was adjourned at 10:41 am.
06/05/1997	Court came to order at 10:05 am. Witnesses were sworn and the Rule was invoked. State began testimony on the Motion to Suppress Evidence. State rested at 10:32 am. Defense introduced evidence by exhibits. The Motion to Suppress Evidence as it pertains to the Tech-9 clip and 14-round ammunition was denied by the Court. Court recessed at 10:42 am until Friday, June 13, 1997.

* * *

Date	Document
07/08/1997	At 1:35 pm the Jury was seated in open Court and Court came to order. The indictment was presented to which the defendant plead "Not Guilty." The State made a brief opening statement. State's testimony began at 1:45 pm. At 3:15 pm the Court took a brief recess. At 3:51 pm the Jury was seated in open court. State's testimony resumed at this time. At 5:05 pm the Court admonished the Jury briefly before releasing them for the day. The Defense made a Motion for a Mistrial which was denied by the Court. Court was adjourned at this time.

Date	Document
07/09/1997	At 8:40 am Court came to order and the Jury was seated. State's testimony resumed at this time. At 10:25 am the Court took a brief recess. At 10:45 am the Jury was seated in Court and the State's testimony resumed. At 12:36 pm the State rests. The Court began its lunch recess at this time. At 1:50 pm Court came to order. Objections to the charge were made. Defense made a Motion for an Instructed Verdict which was denied by the Court. At 2:02 pm the Jury was seated. Defense rests. Both sides close. The Court's charge was presented at this time. State's arguments began at 2:25 pm and concluded at 2:30 pm. Defense arguments began at this time and concluded at 2:47 pm. State's arguments began at this time and concluded at 3:10 pm. The Jury was retired at this time to begin its deliberation. Juror #13 Sherry Collins was released from further services. At 3:43 pm the Jury was seated in open Court and returned a verdict of Guilty of Capital Murder. Defense made a request to poll the Jury, which was granted by the Court. The Court admonished he Jury briefly before releasing them for the day at 3:47 pm. Court was adjourned at this time.

Date	Document
07/10/1997	At 8:45 am Court came to order. The Jury was seated in open Court. State's testimony as to punishment began at this time. At 9:25 am the Jury was retired for a brief hearing outside of their presence. The hearing concluded at 9:50 am. At 10:00 am, the Jury was seated in open Court. State's testimony resumed. At 10:58 am, the Jury was retired briefly. At 11:06 am, the Jury was seated in open Court. State rests at this time. Defense testimony began at this time. At 11:08 am, Defense rests. State closes. The Court began its lunch recess at 11:10 am. At 12:45 pm, objections to the charge were made and other matters discussed. At 1:00 pm, the Jury was seated in Court. The Court's charge was presented at this time. Defense's final arguments began at 1:15pm and concluded at 1:30 pm. State's final arguments began at this time and concluded at 1:50 pm. At 2:15 pm, the Jury was seated in open court and assessed punishment at Death. Defense made a motion to have the jury polled which was granted. The Court pronounced sentence upon the defendant and released the Jury at 2:30 pm. Court was adjourned at this time. Notice of Appeal.

Date	Document
07/15/1997	On the 15th of July, 1997, came to be heard the Defendant's proof of indigency and it appearing to the Court, the defendant is indigent and the defendant specifically requests the Court of Criminal Appeals to prosecute his trial application for Writ of Habeas Corpus.
08/25/1997	Court comes to order at which time came to be heard Defense's Motion for New Trial. Defense puts on brief testimony. Arguments were heard from both sides. The Court denied the said motion.

* * *

APPENDIX B

RELEVANT DOCKET ENTRIES

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

EX PARTE	§	
	§	
	§	
CARLOS MANUEL AYESTAS,	§	No. WR-69,674-01
	§	
	§	
Applicant	§	

On Application for Writ of Habeas Corpus
in Cause No. 754409-A in the 230th Judicial
District Court of Harris County

Date	Document
07/09/1997	Judgment and Sentence
12/02/1997	Court's Findings of Fact Under Art. 11.071, § 2(b), V.A.C.C.P.
12/19/1997	Findings of Indigencey and Desire for Appointment of Habeas Counsel and Order
11/04/1998	Opinion
11/20/1998	Mandate
	* * *
12/09/1998	Application for Writ of Habeas Corpus
	* * *

Date	Document
01/08/1999	Supplement to Applicant's Initial Application for Writ of Habeas Corpus Brought Pursuant to Article 11.071
02/01/2005	Respondent's Original Answer
	* * *
02/01/2005	Affidavit of Diana Olvera
02/01/2005	Affidavit of Bill Hawkins
02/01/2005	Affidavit of Don Smyth
	* * *
02/17/2005	Applicant's Response to Respondent's Original Answer and Request for an Evidentiary Hearing
	* * *
03/28/2005	Applicant's Supplemental Response to Respondent's Original Answer and Request for an Evidentiary Hearing
	* * *
09/22/2006	Affidavit of Dennis Humberto Zelaya AKA Carlos Manuel Ayestas
12/15/2006	11.071 Writ of Habeas Corpus Oath of Indigence/ Findings of Fact/ Order Appointing Counsel/ Statement of Facts
	* * *
01/17/2008	Applicant's Proposed Findings of Fact and Conclusions of Law on Applicant's Application for Writ of Habeas Corpus
	* * *
01/17/2008	Respondent's Proposed Findings of Facts and Order

Date	Document
02/18/2005	Order Adopting Respondent's Proposed Findings of Fact and Conclusions of Law
	* * *
09/10/2008	Order Denying Petition for Writ of Habeas Corpus
	* * *

APPENDIX C

RELEVANT DOCKET ENTRIES

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

No. 72,928

CARLOS MANUEL AYESTAS,
Defendant-Appellant

v.

THE STATE OF TEXAS,
Plaintiff-Appellee

Direct Appeal from the 230th District Court
Harris County

Date	Document
05/12/1998	Appellant's Brief filed
05/22/1998	Appellant's Supplemental Brief filed
	* * *
07/27/1998	State's Brief filed
	* * *
11/04/1998	Opinion Issued (Affirmed)
11/04/1998	Opinion Issued (Affirmed)
	* * *
11/20/1998	Mandate Issued

APPENDIX D

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

No. 4:09-cv-02999

CARLOS MANUEL AYESTAS,
also known as Dennis Zelaya Corea,

Petitioner

v.

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent

Date	ECF	Document
09/11/2009	1	PETITION for Writ of Habeas Corpus * * * filed by Carlos Manuel Ayestas * * *
		* * *
02/24/2010	8	STATE COURT RECORDS by Nathaniel Quarterman * * *
		* * *
04/09/2010	11	ANSWER to Petition for Writ of Habeas Corpus by Nathaniel Quarterman * * *
		* * *
10/26/2010	14	RESPONSE to Answer to Habeas Petition, filed by Carlos Manuel Ayestas * * *

Date	ECF	Document
12/21/2010	15	Opposed MOTION to Stay *Habeas Proceedings*, Opposed MOTION to Abate * * * by Carlos Manuel Ayestas * * *
12/21/2010	16	Opposed MOTION for Leave to File Affidavits/Expand Habeas Record by Carlos Manuel Ayestas * * *
01/30/2011	17	ORDER denying Motion to Stay; denying Motion to Abate * * *
01/25/2011	18	Opposed MOTION for Appointment of Investigator by Carlos Manuel Ayestas * * *
01/26/2011	19	MEMORANDUM OPINION AND ORDER; Motion for Summary Judgment * * * is GRANTED; Petition for a Writ of Habeas Corpus * * * is in all respects DENIED and Petition is DISMISSED WITH PREJUDICE; Petitioner's Motion to Expand Record * * * is DENIED; Motion for the Appointment of an Investigator * * * is DENIED; No Certificate of Appealability shall issue in this case * * *

Date	ECF	Document
01/26/2011	20	FINAL JUDGMENT; This action is DISMISSED WITH PREJUDICE; No certificate of appealability shall issue. Case terminated on January 26, 2011 * * *
02/23/2011	21	Opposed MOTION to Alter Judgment by Carlos Manuel Ayestas * * *
02/28/2011	22	ORDER Denying Opposed MOTION to Alter Judgment * * *
03/29/2011	23	NOTICE OF APPEAL of US Court of Appeals for the Fifth Circuit re: Final Judgment, Memorandum and Opinion, by Carlos Manuel Ayestas * * *
		* * *
02/27/2012	30	PER CURIAM of USCA for the Fifth Circuit; (certified copy) re: Notice of Appeal; USCA No. 11-70004. Motion for a certificate of appealability is DENIED * * *
		* * *
07/16/2012	32	Order of USCA re: Notice of Appeal; USCA No. 11-70004. It is Ordered that the petition for rehearing is denied * * *

Date	ECF	Document
06/06/2013	33	The petition for a writ of certiorari filed with the Supreme Court has been GRANTED (USCA No 11-70004) (USSC No. 12-6656). The motion for petitioner for leave to proceed In Forma Pauperis and the Petition for a writ of certiorari are GRANTED. The judgment is VACATED and the case is REMANDED to the US Court of Appeals for the Fifth Circuit for further consideration * * *
02/10/2014	34	Order of USCA for the Fifth Circuit (certified copy) re: Notice of Appeal; USCA No. 11-70004. Motion to vacate the prior decision denying Ayestas's application for a COA. REMAND to the District Court * * *
		* * *
06/16/2014	40	BRIEF On Remand by Carlos Manuel Ayestas * * *
		* * *
09/02/2014	44	Supplemental BRIEF re: Order by Rick Thaler * * *
		* * *
10/06/2014	47	REPLY to *Respondent's Supplemental Briefing*, filed by Carlos Manuel Ayestas * * *

Date	ECF	Document
11/03/2014	48	Opposed MOTION Proceed Ex Parte and Under Seal Under 18 U.S.C. § 3599 by Carlos Manuel Ayestas * * *
11/03/2014	49	Sealed Event * * *
		* * *
11/18/2014	51	MEMORANDUM OPINION AND ORDER denying Sealed Motion for Funding of Ancillary Services, mooting Opposed MOTION Proceed Ex Parte and Under Seal under 18 U.S.C. § 3599. Petitioner's Ineffective Assistance of Counsel Claims are denied as procedurally defaulted. No Certificate of Appealability will issue in this case * * *
11/18/2014	52	FINAL JUDGMENT. This action is dismissed with prejudice. Case terminated on 11/18/2014 * * *
12/16/2014	53	Opposed MOTION to Alter Judgment by Carlos Manuel Ayestas * * *
01/09/2015	54	Opposed MOTION to Amend by Carlos Manuel Ayestas * * *
01/14/2015	55	Supplemental MOTION to Alter Judgment by Carlos Manuel Ayestas * * *

Date	ECF	Document
01/14/2015	56	Opposed MOTION to Stay *and Hold in Abeyance* by Carlos Manuel Ayestas * * *
		* * *
01/20/2015	59	RESPONSE in Opposition to Opposed MOTION to Amend, Opposed MOTION to Stay *and Hold in Abeyance*, filed by Rick Thaler * * *
01/21/2015	60	RESPONSE in Opposition to Supplemental MOTION to Alter Judgment, Opposed MOTION to Alter Judgment, filed by Rich Thaler * * *
		* * *
01/27/2015	62	REPLY to Response to Supplemental MOTION to Alter Judgment, Opposed MOTION to Amend, Opposed MOTION to Stay *and Hold in Abeyance*, filed by Carlos Manuel Ayestas * * *
02/17/2015	63	ORDER denying Motion to Amend, and denying Motion to Stay * * *
04/01/2015	64	MEMORANDUM OPINION AND ORDER denying Opposed MOTION to Alter Judgment denying Supplemental MOTION to Alter Judgment. No Certificate of Appealability shall issue * * *

Date	ECF	Document
04/29/2015	65	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: Order on Motion to Amend, Order on Motion to Stay, Memorandum and Opinion, Final Judgment, Memorandum and Opinion, by Carlos Manuel Ayestas * * *
		* * *
06/10/2016	70	Order of USCA re: Notice of Appeal. The Petition for Rehearing En Banc is DENIED. The Petition for Panel Rehearing is also DENIED * * *
06/20/2016	71	Order of USCA Judgment re: Notice of Appeal, USCA No. 15-70015. It is ordered and adjudged that the judgment of the District Court is affirmed. Appeal reinstated * * *
06/20/2016	72	Order of USCA Per Curiam re: Notice of Appeal, No. 15-70015. The request for a certificate of appealability is DENIED. The judgment rejecting Ayestas' Section 2254 application is AFFIRMED * * *
		* * *

Date	ECF	Document
04/04/2017	74	The petition for a writ of certiorari filed with the Supreme Court has been granted limited to Question 2 (USCA No. 15-70015) (USSC No. 16-6795) * * *

* * *

APPENDIX E

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-70004

CARLOS MANUEL AYESTAS,
also known as Dennis Zelaya Corea,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent - Appellee

Date	Document
03/31/2011	DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Carlos Manuel Ayestas * * *
	* * *
04/05/2011	RECORD ON APPEAL FILED * * *
	* * *
06/15/2011	OPPOSED MOTION filed by Appellant Mr. Carlos Manuel Ayestas for certificate of appealability * * *
06/15/2011	BRIEF IN SUPPORT filed by Appellant Mr. Carlos Manuel Ayestas in support of motion for certificate of appealability * * *
	* * *

Date	Document
09/12/2011	RESPONSE/OPPOSITION filed by Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions to the motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas * * *
02/22/2012	UNPUBLISHED OPINION ORDER FILED * * * denying motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas * * *
02/22/2012	MANDATE ISSUED * * *
	* * *
03/09/2012	PETITION filed by Appellant Mr. Carlos Manuel Ayestas, *Petition* for Rehearing * * *
	* * *
03/22/2012	OPPOSED MOTION filed by Appellant Mr. Carlos Manuel Ayestas to vacate opinion and judgment filed * * *
	* * *
04/02/2012	RESPONSE/OPPOSITION filed by Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions to the motion to vacate opinion and judgment filed by Appellant Mr. Carlos Manuel Ayestas * * *

Date	Document
04/09/2012	REPLY filed by Appellant Mr. Carlos Manuel Ayestas to the response /opposition filed Appellee Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions * * *
06/18/2012	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellant Mr. Carlos Manuel Ayestas * * *
07/11/2012	COURT ORDER denying motion to vacate opinion and judgment filed by Appellant Mr. Carlos Manuel Ayestas; denying motion to remand case filed by Appellant Mr. Carlos Manuel Ayestas; denying petition for rehearing filed by Appellant Mr. Carlos Manuel Ayestas * * *
	* * *
07/31/2012	OPPOSED MOTION filed by Appellant Mr. Carlos Manuel Ayestas for reconsideration of the Order dated 07/17/2012 * * *
10/04/2012	COURT ORDER denying motion for reconsideration filed by Appellant Mr. Carlos Manuel Ayestas; Judge(s): WED, JES, and LHS * * *
10/12/2012	SUPREME COURT NOTICE that petition for writ of certiorari was filed by Appellant Mr. Carlos Manuel Ayestas on 10/09/2012 * * *

Date	Document
06/03/2013	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Carlos Manuel Ayestas in 11-7004 on 06/03/2013 * * *
07/05/2013	SUPREME COURT JUDGMENT filed on 07/05/2013 remanding case to the 5th Circuit * * *
	* * *
09/16/2013	APPELLANT'S BRIEF FILED by Mr. Carlos Manual Ayestas * * *
09/18/2013	RECORD EXCERPTS FILED by Appellant Mr. Carlos Manuel Ayestas * * *
	* * *
11/20/2013	APPELLEE'S BRIEF FILED by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions * * *
	* * *
12/09/2013	APPELLANT'S REPLY BRIEF FILED by Mr. Carlos Manuel Ayestas * * *
	* * *
01/30/2014	UNPUBLISHED OPINION ORDER FILED. Judge: WED, Judge: JES, Judge: LHS. ISSUED AS & FOR THE MANDATE * * *
01/30/2014	MANDATE ISSUED * * *

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES

No. 12-6656

CARLOS MANUEL AYESTAS,
Petitioner,

v.

RICK THALER,
Director, Texas Department of Criminal Justice,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

Date	Document
10/09/2012	Petition for a Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis filed. (Response due November 13, 2012)
	* * *
01/14/2013	Brief of Respondent Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
	* * *
02/04/2013	Reply of Petitioner Carlos Manuel Ayestas filed. (Distributed)

Date	Document
	* * *
06/03/2013	Motion to Proceed In Forma Pauperis and Petition for a Writ of Certiorari GRANTED. Judgment VACATED and case REMANDED for further consideration in light of *Trevino v. Thaler*, 569 U.S. ___ (2013).
07/05/2013	JUDGMENT ISSUED.

APPENDIX G

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70015

CARLOS MANUEL AYESTAS,
also known as Dennis Zelaya Corea,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent - Appellee

Date	Document
05/01/2015	DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Carlos Manuel Ayestas * * *
	* * *
07/23/2015	MOTION for certificate of appealability. Document is insufficient for the following reasons: certificate of service reflects Mr. Wolff who is not appointed to represent appellant Motion due deadline satisfied * * *

Date	Document
07/23/2015	DOCUMENT RECEIVED - NO ACTION TAKEN. No action will be taken on the Appellant's Brief received from Appellant Mr. Carlos Manuel Ayestas because leave of the Court is required * * *
07/23/2015	DOCUMENT RECEIVED - NO ACTION TAKEN. No action will be taken on the Record Excerpts received from Appellant Mr. Carlos Manuel Ayestas because leave of the Court is required * * *
07/23/2015	BRIEF IN SUPPORT filed by Appellant Mr. Carlos Manuel Ayestas in support of motion for certificate of appealbility (INCORPORATED IN MOTION FOR COA) * * *
07/28/2015	MOTION filed by Appellant Mr. Carlos Manuel Ayestas for leave to file document * * *
07/28/2015	EXHIBITS IN SUPPORT of motion for leave to file document filed by Appellant Mr. Carlos Manuel Ayestas * * *
07/30/2015	The motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas in 15-70015 has been made sufficient * * *

Date	Document
08/04/2015	COURT ORDER granting motion for leave to file merits brief and record excerpts filed by Appellant Mr. Carlos Manuel Ayestas * * *
08/04/2015	APPELLANT'S BRIEF FILED * * *
08/04/2015	RECORD EXCERPTS FILED by Appellant Mr. Carlos Manuel Ayestas * * *
	* * *
08/24/2015	RESPONSE/OPPOSITION to the motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas in 15-70015 * * *
	* * *
09/03/2015	APPELLEE'S BRIEF FILED. Brief NOT sufficient as it requires the citations to the record. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT * * *
09/15/2015	BRIEF MADE SUFFICIENT filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division * * *
	* * *
09/21/2015	APPELLANT'S REPLY BRIEF FILED

Date	Document
09/21/2015	UNOPPOSED MOTION filed by Appellant Mr. Carlos Manuel Ayestas for leave to file a reply to the response/opposition filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division * * *
09/22/2015	COURT ORDER granting motion for leave to file a reply filed by Appellant Mr. Carlos Manuel Ayestas to the response to motion for certificate of appealability * * *
09/22/2015	REPLY filed by Appellant Mr. Carlos Manuel Ayestas to the response/opposition filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division; to the motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas * * *
	* * *
03/22/2016	PUBLISHED OPINION FILED. Judge: WED, Judge: JES, Judge: LHS. Mandate pull date is 04/12/2016; denying motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas * * *
03/22/2016	JUDGMENT ENTERED AND FILED * * *

Date	Document
03/24/2016	COURT ORDER granting motion to place motion under seal filed by Appellant Mr. Carlos Manuel Ayestas; granting motion to seal tentative budget and budget order filed by Appellant Mr. Carlos Manuel Ayestas * * *
03/24/2016	COURT ORDER approving the tentative budget in this appeal. The approval of this budget in no way entitles counsel to do work or submit charges beyond what is reasonably necessary to represent the client * * *
	* * *
04/19/2016	PETITION for rehearing en banc * * *
04/19/2016	PETITION for rehearing * * *
	* * *
05/23/2016	RESPONSE/OPPOSITION to the court order Court directive requesting a response, petition for rehearing en banc filed by Appellant Mr. Carlos Manuel Ayestas * * *
06/10/2016	COURT ORDER denying petition for rehearing filed by Appellant Mr. Carlos Manuel Ayestas. Mandate pull date is 06/17/2016; denying petition for rehearing en banc filed by Appellant Mr. Carlos Manuel Ayestas. Without Poll * * *
06/20/2016	MANDATE ISSUED. Mandate pull date satisfied * * *

Date	Document
	* * *
11/14/2016	SUPREME COURT NOTICE that petition for writ of certiorari was filed by Appellant Mr. Carlos Manuel Ayestas on 11/07/2016. Supreme Court Number 16-6795 * * *
	* * *
04/04/2017	SUPREME COURT ORDER received granting petition for writ of certiorari, limited to Question 2 presented by the petition filed by Appellant Mr. Carlos Manuel Ayestas in 15-70015 on 04/03/2017 * * *

APPENDIX H

CAPITAL MURDER SUMMARY

PREPARED BY:
KELLY SIEGLER
SEPTEMBER 19, 1995

I. PARTIES

DEFENDANTS: CARLOS AYESTAS
CAUSE NO. 703059;
230TH COURT
D.O.B. 7-30-69 (AGE 26)

FEDERICO ZALDIVAR
CAUSE NO. 703060;
230TH COURT
D.O.B. 10-10-66 (AGE 28)

ROBERTO MEZA
CAUSE NO. 703443;
230TH COURT
D.O.B. 10-19-67 (AGE 27)

VICTIM: SANTIAGA PANEQUE
AGE 67

DATE: SEPTEMBER 5, 1995

LOCATION: 3530 SPEARS ROAD

TYPE OF CASE: CAPITAL MURDER-
ROBBERY/BURGLARY
DEADLY WEAPON-DUCT
TAPE

II. STATEMENT OF FACTS

The victim was found by her son in a bathroom of her home strangled to death with duct tape around

her throat, her ankles, one wrist and around her head covering her eyes.

About one week before the murder, a witness spoke to two of the defendants, Ayestas and Zaldivar, about buying a car from her. The car for sale was located at her house which is directly across the street from the victim's home. The witness says she left both defendants outside of her house while she went inside to get them a glass of water. When she returned outside, she saw both of the defendants going into the home of the victim with the victim accompanying them. The defendants told the witness they had been talking to the victim about buying some of her furniture and had gone inside to look at the furniture. Defendant Meza was not present at this time.

Elim Paneque, the son of the victim who also lived with her, said several items were missing from the house after his mother was killed; including a 20" General Electric television, a 13" Magnavox television and a black and a white telephone with push-buttons.

Witness Casares who knows defendants Ayestas and Zaldivar by sight and name and who identified defendant Meza in a photospread, said all three came to sell the same merchandise to her and two others.

Deputy Rinehart, a print examiner and crime scene technician, says he lifted an identifiable fingerprint from a roll of tape and another from a plastic box containing cufflinks found in the bathroom where the deceased was found and a third from a ceramic bowl found in the living room which had last been sitting on top of the already mentioned

television. Rinehart says upon comparing the prints lifted to those of the three defendants he obtained the following results: the print from the tape roll was made by the defendant Ayestas, the print from the plastic box was made by the defendant Zaldivar and the print from the ceramic bowl was made by the defendant Meza.

All three defendants are currently at large.

* * *

CARLOS AYESTAS

III. AGGRAVATING CIRCUMSTANCES

A. THE VICTIM IS A HELPLESS 67 YEAR OLD WOMAN KILLED IN HER HOME.

B. ~~THE DEFENDANT IS NOT A CITIZEN.~~

IV. MITIGATING CIRCUMSTANCES

A. THE DEFENDANT'S ONLY PRIOR CONVICTION IS FOR MISDEMEANOR THEFT.

V. INDICTMENT RECOMMENDATION

A. COURT CHIEF-KELLY SIEGLER Capital - /s/ KRS 9/19/95

B. DIVISION CHIEF-CASEY O'BRIEN Capital /s/ Casey O'Brien 9/21/95

C. BUREAU CHIEF-KENO HENDERSON Capital /s/ KHenderson 9/21/95

D. DISTRICT ATTORNEY-JOHN B. HOLMES, JR. Capital /s/ JBH

VI. RECOMMENDATION FOR DISPOSITION AT TRIAL

A. COURT CHIEF-KELLY SIEGLER _____

B. DIVISION CHIEF-CASEY O'BRIEN _____

C. BUREAU CHIEF-KENO HENDERSON _____

D. DISTRICT ATTORNEY-JOHN B. HOLMES, JR.

_____ _____

/s/ OK to plead non-killers for Agg. Rob. Life, deadly weapon, see death on killer Ayestas. 2 pleading A's to testify -

/s/ JBH

done 6-5-97

APPENDIX I

DEFENDANT'S EXHIBIT 1

Harris County Sheriff's Department
1301 Franklin
Houston, Texas 77002

Attention Probation Department

Re: **Carlos Ayestes, SPN 1473561**

Mr. Ayestes is currently enrolled as a student in my English as a Second Language Class that I teach in the Harris County Jail. He is a serious and attentive student who is progressing well in English.

Sincerely,

/s/ Mae J. Martin

Mae J. Martin, Instructor
Houston Community
College System

December 1, 1996

DEFENDANT'S
EXHIBIT
2

Harris County Sheriff's Department
1301 Franklin
Houston, Texas 77002

Attention Probation Department

Re: **Ayestes, Carlos, SPN 1473561**

Carlos Ayestas is currently enrolled as a student in my English as a Second Language Class that I teach in the Harris County Jail. Mr. Ayestas is a serious and attentive student who is progressing well in English.

Sincerely,

/s/ Mae J. Martin

Mae J. Martin, Instructor
Houston Community
College System

April 21, 1997

DEFENDANT'S
EXHIBIT
3

Harris County Sheriff's Department
1301 Franklin
Houston, Texas 77002

Attention Probation Department

Re: **Ayestes, Carlos, SPN 1473561**

Carlos Ayestes has been currently enrolled for two semesters as a student in my English as a Second Language Class that I teach in the Harris County Jail. Mr. Ayestes is a serious and attentive student who continues to progress well in English.

Sincerely,

/s/ Mae J. Martin

Mae J. Martin, Instructor
Houston Community
College System

June 10, 1997

APPENDIX J

CHARGE OF THE COURT ON GUILT OR INNOCENCE

FILED: JULY 9, 1997

DEFENDANT'S EXHIBIT 2 MNT 8-25-97 JS

CAUSE NO. 754409

THE STATE OF TEXAS	§	IN THE 230TH
	§	DISTRICT COURT OF
VS.	§	HARRIS COUNTY,
	§	TEXAS
CARLOS MANUEL AYESTAS	§	MAY TERM, A.D., 1997

Members of the Jury:

The defendant, Carlos Manuel Ayestas, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 5th day of September, 1995, in Harris County, Texas. The defendant has pleaded not guilty.

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

A person commits the offense of capital murder if he intentionally commits the murder in the course of committing or attempting to commit the offense of robbery or burglary.

Our law provides that a person commits the offense of burglary if, without the effective consent of the owner, he:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony; or

(2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony or theft.

"Habitation" means a structure that is adapted for the overnight accommodation of persons, and includes: (a) each separately secured or occupied portion of the structure or vehicle and (b) each structure appurtenant to or connected with the structure or vehicle.

"Building" means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

"Enter" means to intrude any part of the body, or any physical object connected to the body.

* * *

A person commits the offense of robbery if, in the course of committing theft, and with intent to obtain or maintain control of property of another he:

(1) intentionally or knowingly causes bodily injury to another; or
(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in the immediate flight after the attempt or commission of theft.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that

tends, but fails, to effect the commission of the offense intended.

"Theft" is the unlawful appropriation of property with intent to deprive the owner of said property.

"Appropriate" and "appropriation" means to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" means tangible or intangible personal property, or a document, including money, that represents or embodies anything of value.

"Deprive" means to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by force, threats, deception or coercion.

"Owner" means a person who has a greater right to possession of the property than the defendant.

"Possession" means actual care, custody, control, or management of the property.

"Deadly weapon" means anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

The definition of intentionally relative to the offense of capital murder is as follows:

A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

The definitions of intentionally or knowingly relative to the offense of murder are as follow:

A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

The definitions of intentionally or knowingly relative to the offenses of robbery and burglary are as follow:

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his

conduct when he is aware that his conduct is reasonably certain to cause the result.

All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

Before you would be warranted in finding the defendant guilty of capital murder, you must believe from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was in the course of committing or attempting to commit the felony offense of robbery of Santiaga Paneque, as defined in this charge, but also that the defendant intentionally caused the death of Santiaga Paneque by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape with the intention of thereby causing the death of Santiaga Paneque and such act by the defendant did cause the death of Santiaga Paneque; or you must believe from the evidence beyond a reasonable doubt that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense of robbery, if any, solicited, encouraged, directed, aided, or attempted to aid Roberto Meza

and/or Rolando Gutierrez also known as Federico Zaldivar in strangling Santiaga Paneque, if he did, with the intention of thereby killing Santiaga Paneque; or you must believe from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was in the course of committing or attempting to commit the felony offense of burglary of Santiaga Paneque, as defined in this charge, but also that the defendant intentionally caused the death of Santiaga Paneque by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape with the intention of thereby causing the death of Santiaga Paneque and such act by the defendant did cause the death of Santiaga Paneque; or you must believe from the evidence beyond a reasonable doubt that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense of burglary, if any, solicited, encouraged, directed, aided, or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar in strangling Santiaga Paneque, if he did, with the intention of thereby killing Santiaga Paneque. Unless you believe from the evidence beyond a reasonable doubt you cannot convict the defendant of the offense of capital murder.

Now, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Carlos Manuel Ayestas, on or about the 5th day of September, 1995, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Santiaga Paneque, intentionally cause the death of Santiaga Paneque, by strangling Santiaga Paneque with a deadly

weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar, on or about the 5th day of September, 1995, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Santiaga Paneque, intentionally cause the death of Santiaga Paneque, by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape and that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar to commit the offense, if he did; or

If you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Carlos Manuel Ayestas, on or about the 5th day of September, 1995, did then and there unlawfully, while in the course of committing or attempting to commit the burglary of Santiaga Paneque, intentionally cause the death of Santiaga Paneque, by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar, on or about the 5th day of September, 1995, did then and there unlawfully, while in the course of committing or attempting to commit the burglary of Santiaga Paneque, intentionally cause the death of Santiaga Paneque,

by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape and that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar to commit the offense, if he did, then you will find the defendant guilty of capital murder as charged in the indictment.

* * *

Unless you so believe beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether the defendant is guilty of felony murder.

A person commits the offense of felony murder if he commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

The definitions of intentionally and knowingly relative to the offense of felony murder are as follow:

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to

circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Therefore, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Carlos Manuel Ayestas, on or about the 5th day of September, 1995, did then and there unlawfully, while in the furtherance of the commission of the felony of robbery of Santiaga Paneque or in immediate flight from the commission of the felony of robbery of Santiaga Paneque, the defendant committed an act clearly dangerous to human life, to-wit: by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar, on or about the 5th day of September, 1995, did then and there unlawfully, while in the furtherance of the commission of the felony of robbery of Santiaga Paneque or in immediate flight from the commission of the felony of robbery of Santiaga Paneque, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar committed an act clearly dangerous to human life, to-wit: by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape and that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed,

aided or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar to commit the offense, if he did; or

If you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Carlos Manuel Ayestas, on or about the 5th day of September, 1995, did then and there unlawfully, while in the furtherance of the commission of the felony of burglary of Santiaga Paneque or in immediate flight from the commission of the felony of burglary of Santiaga Paneque, the defendant committed an act clearly dangerous to human life, to-wit: by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar, on or about the 5th day of September, 1995, did then and there unlawfully, while in the furtherance of the commission of the felony of burglary of Santiaga Paneque or in immediate flight from the commission of the felony of burglary of Santiaga Paneque, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar committed an act clearly dangerous to human life, to-wit: by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape and that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar to commit the offense, if

he did, then you will find the defendant guilty of felony murder.

* * *

Unless you so believe beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of felony murder.

* * *

If you believe from the evidence beyond a reasonable doubt that the defendant is guilty of either capital murder or felony murder but you have a reasonable doubt as to which of said offenses he is guilty, then you must resolve that doubt in the defendant's favor and find him guilty of the lesser offense of felony murder.

If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this charge then you will acquit the defendant and say by your verdict "Not Guilty."

* * *

You are instructed that certain evidence was admitted before you regarding the defendant allegedly having committed an extraneous offense or offenses. Such testimony was admitted for the purpose of aiding you, if it does aid you, in determining the guilty knowledge of the defendant, if any, and you must not consider it for any other purpose.

* * *

A defendant in a criminal case is not bound by law to testify in his own behalf therein and the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you

must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case. If any juror starts to mention the defendant's failure to testify in this case then it is the duty of the other jurors to stop him at once.

* * *

A Grand Jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the

prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not Guilty."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your Foreman. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto and signing the same as Foreman.

During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you

may have about any fact or person connected with this case which is not shown by the evidence.

No one has any authority to communicate with you except the officer who has you in charge. After you have retired, you may communicate with this Court in writing through this officer. Any communication relative to the cause must be written, prepared and signed by the Foreman and shall be submitted to the court through this officer. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the Court, or anyone else concerning any questions you may have.

Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this cause and restrict your deliberations solely to the issue of guilt or innocence of the defendant.

Following the arguments of counsel, you will retire to consider your verdict.

/s/ Bob Burdette
Bob Burdette, Judge Presiding
230th District Court
Harris County, TEXAS

FILED
KATHERINE TYRA
District Clerk
JUL 09 1997
Time: 14:25
Harris County, Texas
By: _____
Deputy

APPENDIX K

CAUSE NO. 754409

THE STATE OF TEXAS	§	IN THE 230TH
	§	DISTRICT COURT OF
VS.	§	HARRIS COUNTY,
	§	TEXAS
CARLOS MANUEL AYESTAS	§	MAY TERM, A.D., 1997

CHOOSE ONE

"We, the Jury, find the defendant, Carlos Manuel Ayestas, not guilty."

_____
Foreman of the Jury

_____
(Please Print) Foreman

"We, the Jury, find the defendant, Carlos Manuel Ayestas, guilty of capital murder, as charged in the indictment."

/s/ Joseph O. Slovacek
Foreman of the Jury

/s/ Joseph O. Slovacek
(Please Print) Foreman

"We, the Jury, find the defendant, Carlos Manuel Ayestas, guilty of felony murder."

_____
Foreman of the Jury

_____
(Please Print) Foreman

FILED
KATHERINE TYRA
District Clerk
JUL 09 1997
Time: 3:46pm
Harris County, Texas
By: _____
Deputy

APPENDIX L

CHARGE OF THE COURT ON ASSESSMENT OF PUNISHMENT

FILED: JULY 10, 1997

DEFENDANT'S EXHIBIT 3 MNT 8-25-97 JS

Cause No. 754409

THE STATE OF TEXAS	§	IN THE 230TH
	§	DISTRICT COURT OF
VS.	§	HARRIS COUNTY,
	§	TEXAS
CARLOS MANUEL AYESTAS	§	MAY TERM, A.D., 1997

Members of the Jury:

By your verdict returned in this case you have found the defendant, Carlos Manuel Ayestas, guilty of the offense of capital murder, which was alleged to have been committed on or about the 5th day of September, 1995, in Harris County, Texas. In order for the Court to assess the proper punishment, it is necessary now for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues," in this charge. The Court instructs you in answering these "Special Issues" as follows:

The mandatory punishment for the offense of capital murder of which you have found the defendant guilty is death or confinement in the Texas Department of Criminal Justice, Institutional Division, for life.

In determining your answers to the questions, or special issues, submitted to you, you shall consider all the evidence submitted to you in this whole trial,

which includes that phase of the trial wherein you were called upon to determine the guilt or innocence of the defendant, and this punishment phase of the trial wherein you are now called upon to determine the answers to Special Issues submitted to you by the Court. However, in this punishment phase of the trial you should not consider the instructions given you in the first phase of trial that relate to the law of parties and the responsibility of parties for the acts of others in the commission of offenses. You shall consider only the conduct and state of mind of this defendant in determining what your answers to the Special Issues shall be.

You shall consider all evidence submitted to you during the whole trial as to the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

* * *

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, record, emotional instability, intelligence or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there is a mitigating circumstance or circumstances in this case, you must decide how much weight it/they deserve, if any, and thereafter, give effect and consideration to it/them in assessing the defendant's

personal culpability at the time you answer the special issue.

You are instructed that mitigating evidence, if any, may be considered by you in answering the special issues under consideration. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence rather than a death sentence is an appropriate response, let your answers to the special issues reflect that.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues.

* * *

Should you return an affirmative finding on Special Issue No. 1 and Special Issue No. 2 and a negative finding on Special Issue No. 3, the Court will sentence the defendant to death. Should you return a negative finding on Special Issue No. 1 or Special Issue No. 2 or an affirmative finding on Special Issue No. 3, the Court will sentence the defendant to confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

* * *

The State must prove Special Issue No. 1 submitted to you beyond a reasonable doubt, and you shall return a Special Verdict of "YES" or "NO" on Special Issue No. 1.

In deliberating on Special Issue No. 1 you shall consider all the evidence admitted at the guilt or innocence stage and the punishment stage of trial,

including evidence of the defendant's background, character, record, emotional instability, intelligence, or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

You may not answer Special Issue No. 1 "YES" unless you agree unanimously.

You may not answer Special Issue No. 1 "NO" unless ten (10) or more jurors agree.

Members of the jury need not agree on what particular evidence supports a negative answer to Special Issue No. 1.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you and in answering the Special Issue No. 1.

It is not required that the State prove Special Issue No. 1 beyond all possible doubt; it is required that the State's proof excludes all "reasonable doubt" concerning the defendant.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

The State must prove Special Issue No. 2 submitted to you beyond a reasonable doubt, and you shall return a Special Verdict of "YES" or "NO" on Special Issue No. 2.

In deliberating on Special Issue No. 2 you shall consider all the evidence admitted at the guilt or innocence stage and the punishment stage of trial, including evidence of the defendant's background, character, record, emotional instability, intelligence, or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

You may not answer Special Issue No. 2 "YES" unless you agree unanimously.

You may not answer Special Issue No. 2 "NO" unless ten (10) or more jurors agree.

Members of the jury need not agree on what particular evidence supports a negative answer to Special Issue No. 2.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you and in answering the Special Issue No. 2.

It is not required that the State prove Special Issue No. 2 beyond all possible doubt; it is required that the State's proof excludes all "reasonable doubt" concerning the defendant.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person

hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

You are instructed that if you return an affirmative finding, that is a "YES" answer, to Special Issue No. 1 and Special Issue No. 2, and only then, are you to answer Special Issue No. 3.

You are instructed that in answering special Issue No. 3, you shall answer the issue "YES" or "NO."

You may not answer Special issue No. 3 "NO" unless you agree unanimously, and you may not answer Special Issue No. 3 "YES" unless ten (10) or more of you agree to do so.

You need not agree on what particular evidence supports an affirmative finding on Special Issue No. 3.

In answering Special Issue No. 3 you shall consider mitigating evidence to be the evidence that a juror might regard as reducing the defendant's moral blameworthiness, including evidence of the defendant's background, character, record, emotional instability, intelligence, or the circumstances of the offense that mitigates against the imposition of the death penalty.

You are again instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in

considering all of the evidence before you in answering Special Issue No. 3.

* * *

You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

* * *

You are instructed that under the law applicable in this case a prisoner serving a life sentence for the offense of capital murder is not eligible for release on parole until the actual calendar time the prisoner has served, without consideration of good time, equals forty (40) years. During your deliberations, you are not to consider or discuss the possible action of the Board of Pardons and Paroles or the Governor, nor how long the defendant would be required to serve to satisfy a sentence of life imprisonment, nor how the parole laws would be applied to this defendant after the expiration of forty (40) years. Eligiblity for parole does not guarantee that parole will be granted.

During your deliberations upon the "Special Issues," you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person

connected with this case which is not shown by the evidence.

In arriving at the answers to the "Special Issues" submitted, it will not be proper for you to fix the same by lot, chance, or any other method than by a full, fair and free exchange of the opinion of each individual juror.

After the reading of this charge, you shall not be permitted to separate from each other, nor shall you talk with anyone not of your jury. After argument of counsel, you will retire and consider your answers to the "Special Issues" submitted to you. It is the duty of your foreman to preside in the jury room and vote with you on the answers to the "Special Issues" submitted.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given to their testimony, but you are bound to receive the law from the Court which has been given you and you are bound thereby.

/s/ Bob Burdette
Bob Burdette, Judge Presiding
230th District Court
Harris County, TEXAS

FILED
KATHERINE TYRA
District Clerk
JUL 10 1997
Time: 13:15
Harris County, Texas
By: _____
Deputy

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Carlos Manuel Ayestas, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "YES."

FILED
KATHERINE TYRA
District Clerk
JUL 10 1997
Time: 14:15
Harris County, Texas
By: _____
Deputy

/s/ Joseph O. Slovacek
Foreman of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the probability that the defendant, Carlos Manuel Ayestas, would commit criminal acts of violence that would constitute a continuing threat to society, determine that the answer to this Special Issue is "NO."

_____
Foreman of the Jury

In the event that the jury has answered Special Issue No. 1 in the affirmative, and only then, shall the jury answer Special Issue No. 2 to be found on the following page.

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that Carlos Manuel Ayestas, the defendant himself, actually caused the death of Santiaga Paneque, the deceased, on the occasion in question, or if he did not actually cause the death of Santiaga Paneque, that he intended to kill Santiaga Paneque, or that he anticipated that a human life would be taken?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "YES."

/s/ Joseph O. Slovacek
Foreman of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt that Carlos Manuel Ayestas, the defendant himself, actually caused the death of Santiaga Paneque, the deceased, on the occasion in question, or that he intended to kill Santiaga Paneque, or that he anticipated that a human life would be taken, determine that the answer to this Special Issue is "NO."

_____
Foreman of the Jury

In the event that the jury has answered Special Issue No. 2 in the affirmative, and only then, shall the jury answer Special Issue No. 3 to be found on the following page.

SPECIAL ISSUE NO. 3

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Carlos Manuel Ayestas, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER

We, the jury, unanimously find that the answer to this Special Issue is "NO."

/s/ Joseph O. Slovacek
Foreman of the Jury

OR

We, the jury, because at least ten (10) jurors find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed, find that the answer to this Special Issue is "YES."

_____
Foreman of the Jury

After the jury has answered each of the Special Issues under the conditions and instructions outlined above, the Foreman should sign the verdict form to be found on the last page of this charge.

VERDICT

We, the Jury, return in open court the above answers to the "Special Issues" submitted to us, and the same is our verdict in this case.

/s/ Joseph O. Slovacek
Foreman of the Jury

APPENDIX M

No. 754409

THE STATE OF TEXAS vs. CARLOS MANUEL AYESTAS	IN THE 230th DISTRICT COURT OF HARRIS COUNTY, TEXAS Change of Venue From:

JUDGMENT – DEATH PENALTY

Judge Presiding: BOB BURDETTE	Date of Judgment: **JUL 09 1997**
Attorney for State: BILL HAWKINS	Attorney for Defendant: DIANA OLVERA & CONNIE WILLIAMS
Offense Convicted of: CAPITAL MURDER	
Degree: CAPITAL Punishment Assessed: DEATH	Date Offense Committed: 9-5-1995
Charging Instrument: Indictment	Plea: Not Guilty

Affirmative Findings: (Circle appropriate selection – N/A not available or not applicable)

DEADLY WEAPON: ~~Yes~~ | ~~No~~ | N/A	FAMILY VIOLENCE: ~~Yes~~ | ~~No~~ | N/A	HATE CRIME: ~~Yes~~ | ~~No~~ | N/A

The Defendant having been indicted in the above entitled and numbered cause for the felony offense indicated above and this cause being this day called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, and both parties announced ready for trial.

A Jury composed of Joseph Osmond Slovacek and eleven others was selected, impanelled, and sworn. The indictment was read to the Jury, and the Defendant entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant and having heard argument of counsels, the Jury retired in charge of the proper officer and returned into open Court on 7-9-, 1997, the following verdict, which was received by the Court and is here entered on record upon the minutes:

> "We, the Jury, find the defendant, CARLOS MANUEL AYESTAS, guilty as charged in the indictment."
>
> /s/ Joseph Osmond Slovacek
> Presiding Juror

Thereupon, the Jury, in accordance with law, heard further evidence in consideration of punishment, and having been again charged by the Court, the jury retired in charge of the proper officer in consideration of punishment and returned into open court on the 10 day of July, 1997, the following verdict, which was received by the Court and is here entered of record upon the minutes:

(Special Issues/Verdict/Certification):

SPECIAL ISSUE NO. 1 Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, CARLOS MANUEL AYESTAS, WOULD commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER "Yes"

/s/ Joseph Osmond Slovacek
Presiding Juror

SPECIAL ISSUE NO. 2 Do you find from the evidence beyond a reasonable doubt that CARLOS MANUEL AYESTAS, the defendant himself, actually caused the death of SANTIAGA PANEQUE, the deceased, on the occasion in question, or if he did not actually cause the death of SANTIAGA PANEQUE, that he intended to kill SANTIAGA PANEQUE, or that he anticipated that a human life would be taken?

ANSWER "Yes"

/s/ Joseph Osmond Slovacek
Presiding Juror

SPECIAL ISSUE NO. 3 Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, CARLOS MANUEL AYESTAS, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER "No"

/s/ Joseph Osmond Slovacek
Presiding Juror

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense indicated above, a felony, as found by the verdict of the jury, and that the said Defendant committed the said offense on the date indicated above, and that he be punished as has been determined by the Jury, by death, and that Defendant be remanded to jail to await further orders of this court.

And thereupon, the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof.

Whereupon the Court proceeded, in presence of said Defendant to pronounce sentence against him as follows, to wit, "It is the order of the Court that the Defendant named above, who has been adjudged to be guilty of the offense indicated above and whose punishment has been assessed by the verdict of the jury and the judgment of the Court at Death, shall be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division, Texas Department of Criminal Justice or any other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institutional Division in accordance with the provisions of the law governing the Texas Department of Criminal Justice, Institutional Division until a date of execution of the said Defendant is imposed by this Court after receipt in this Court of mandate of affirmance from the Court of Criminal Appeals of the State of Texas.

The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence. From

which sentence an appeal is taken as a matter of law to the Court of Criminal Appeals of the State of Texas.

Signed and entered on this the ___ day of JUL 10 1997, 19__.

/s/ Bob Burdette
Judge, 230th DISTRICT COURT
Harris County, Texas

RECORDER'S MEMORANDUM
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filing.

AUG 25 1997: *Defense Motion for New Trial DENIED.*

7-24-1997: *Defense Motion for New Trial FILED.*

APPENDIX N

INVESTIGATIVE MEMORANDUM

TO: **Gary Hart**
FROM: **Tena S. Francis**
DATE: **February 14, 1998**
CASE: **Carlos Manuel Ayestas**
RE: **Preliminary Plan For Habeas Investigation**

As per your request. I have outlined a preliminary plan for the investigation of this case. This plan is based on the information provided to me, which consisted of your notes documenting your reading of the trial record.

Please note this "plan" is based only on the information I have reviewed. As the investigation progresses, it is likely that investigation tasks will be both added and deleted from this proposal. And, although it is difficult to estimate how many hours will be needed to complete this investigation, I am proposing at least 300 hours will be required to conduct the investigation tasks outlined in this memo.

It will be impossible to conduct a competent investigation in this case without going to Louisiana, or in the alternative, hiring someone there to do the investigation.

If you have any questions or comments concerning this proposal, please give me a call.

Questions I have

My review of the notes you provided has left with me with more questions than answers about this case.

It's my opinion that most of these questions should be answered in order for Ayestas to receive fair representation.

Who was the person (or persons) from the Greenspoint area who told Detective Reynolds that "Dennis" and "Rolando" had confessed? Why did this person not testify at the client's trial? Is it because they failed to make an identification of the defendant? We need to review the police file on this case in order to answer this question. Then, it is possible we will need to interview the person(s) Reynold's referred to in his testimony. (This will take approximately 5.0-8.0 hours)

Why were the items that belonged to the victim and that were recovered from the "luggage" in Louisiana not admitted into evidence? Was there a problem proving the client owned or had access to this luggage? If so, is this indicative of the co-defendant(s) being more culpable? This needs to be addressed with the trial attorneys, and by a review of the police records. (5.0 hours)

What happened to the charges filed against the client in Louisiana? Were they dismissed before his Texas case came to trial? If so, we need as much information as possible about them, as there may be impeachment information with regard to witness Nuila. We must collect the court, prosecution, defense attorney, and police records for these charges, then interview any witnesses that are relevant. (10.0–20.0 hours)

What are the details of the client's oral confession to Kenner, Louisiana authorities? Did he or the co-defendants say anything that could have helped him at trial? We need to review the file of

the Kenner police in order to answer this question. We may also need to interview the Kenner Police Department employees who worked on the case. (3.0–10.0 hours)

Who were the seven original "suspects" whose fingerprints were used to compare to those found at the crime scene? How were they identified? Does this matter? [Even though there were no matches to the prints found at the crime scene, it is possible these men were named suspects originally based on something the witness Anna McDugall (or others) said to the police.] Again, this information should be found in the HCSO file.

Was the uzi recovered in Louisiana identified as belonging to the defendant, or not? There seemed to be an issue at trial as to whether the weapon shown the jury was the weapon recovered in Louisiana and whether it was the weapon used to threaten the alleged victim, Martinez. Does this matter?

It certainly is suspect that so much of the state's evidence was discovered in 1997, even though the same forensic tests were run in 1995. I do not know if any of this is important at this point; but must point out how odd it was that the state's case fell together so nicely at the very last minute. Ditto for the change in the medical examiner's report. Why was the report changed to include the possibility the victim was strangled manually? Was there a statement that the defendants' killed her that way? What can we do about this information?

Trial defense team

We need to review the records of both trial attorneys, as well as their investigator and any expert witnesses they hired. Among other issues to cover with them, we must determine:

How well could they communicate with Ayestas, given his limited ability (if any at all) to speak English? (Did he fully understand the proceedings and was he able to assist his attorneys?) How much contact did they have with their client? If they used an interpreter, we need the person's name.

Did they conduct an investigation into possible mitigation issues? If so, we need details. Did they attempt to hire any expert witnesses for that stage of the proceedings? If so, we need names of the experts, their reports, and info in re their appointments. Did they investigate the validity of the California charges/convictions?

Did they conduct any investigation in Louisiana?

The co-defendants

We need to determine what happened to Federico Zaldivar and Roberto Meza. If they had trials, we need to review the records of these trials for inconsistencies in the evidence presented. This will involve reviewing the court records, as well as the police and prosecutor's trials for these defendants. (10.0 - 20.0 hours) We should interview the co-defendants as to their knowledge of our client and the case against them. (5.0 hours)

Credibility of key witnesses

A comprehensive background investigation must be conducted of key witness Henry Nuila of Louisiana. Such an investigation will include interviewing him, looking at his criminal history, and interviewing the members of his family who were involved int his case. Questions to be answered by such an investigation will include: Did the defense interview his sister and brother-in-law, with whom the defendants had been staying? Which of the three defendants was the "leader", who usually had possession of the gun, etc. Why did Nuila have a relationship with a local policeman? Had he been in legal trouble before or during this time? How was his original statement different from his trial testimony? Why was it different? Did the police threaten to charge his family with harboring? This investigation could take 20.0 - 30.0 hours to complete.

A comprehensive background investigation should also be undertaken with reference to punishment phase witness Candelario Martinez. Apparently, the description Martinez gave police the day of the assault differed from the description of Ayestas. We need to investigate this further. We also need to know what the police opined about the alleged crime against Martinez and his friend: did they suspect these two men were involved with drug dealing? If so, then the report of the police officers might have proven to be impeachment material for this witness. Was Martinez pressured into identifying the defendant, due to some legal

troubles of his own? In addition to interviewing him and compiling a criminal history for him, we should also obtain a complete copy of the police investigation pertaining to the assault of which he was a victim. Once we get this report, we will have the name of his friend, who was also victimized, and we should speak to that person also, in order to determine why he was not called as a witness against Ayestas. This investigation could take 25.0 - 40.0 hours.

Records to collect:

As is noted throughout this memo, we should make an effort to obtain these records, with regard to each of the three defendants:

Harris County Sheriff's Department file
Harris County D.A.'s file
Kenner, Louisiana Police file
Kenner prosecutor's file
Kenner defense attorney's file (if applicable)

Mitigation investigation

It is obvious no social history investigation was conducted. The lack of evidence at the punishment phase of the trial is indicative of this.

The jury heard nothing about this defendant's: family, real character, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological trauma he suffered, etc. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history interview of the client. In essence, a competent social history investigation will detail every

> aspect of the client's life: pre-natal care, birth, medical and psychological histories, education / academic achievements, religious background, employment history, military service experience, criminal activity, incarceration history, incidents of substance abuse, family background information, cultural considerations, inter-personal relations, the development of social skills, and many other factors. If possible, witnesses to be interviewed not only include the client and close members of his family, but also persons who are/were in a position to be more objective about the client and his surroundings. Other witnesses contacted are those persons who are able to provide professional assessments of the client and his family situation. Such an investigation will take up to 200.0 hours.

Additionally, at the very least, the trial attorneys could have pursued the following (and we should pursue this information now):

> The only defense evidence presented were the letters written by a teacher who met Ayestas at the jail. Remarkably, these letters were written to jail administrators; not to the defense attorneys. Did the attorneys even interview this potential witness?
>
> Skipper-type evidence from the California Department of Corrections and the Harris County Jail. This could have been accomplished by looking at the client's incarceration records from both institutions. If he was a good inmate, then guards should have been interviewed. At this point, we should obtain a copy of both these

prison and jail records, in order to see what had been available to trial counsel.

It is clear the defendant had a history of substance abuse. What we know from reviewing the trial evidence is that Ayestas probably abused heroine and/or cocaine while in California; that he had what appeared to be a drug-related run-in with alleged victim Martinez in Houston days after this murder, and that he had gotten so drunk he "passed out" on the day of his arrest. Would there have been a defense to his conduct due to some sort of addiction? We should look at substance abuse as mitigation. This will be accomplished by conducting a thorough interview of the client, as well as interviewing the Louisiana witnesses with whom the client had stayed for two weeks around the time of the crime.

Did trial counsel investigate the California cases? At the very least, we should look carefully at court and police records of these arrests and convictions, in order to ascertain as to whether there were grounds to challenge their admissibility as evidence.

I cannot help but wonder what items were removed from Ayestas's California pen packet before it was sent to the jury. We need to examine these items, which became SX 126-A and 126-B.

Juror interviews

There is a need for juror interviews for this case. Were they confused about the instruction regarding capital murder? Why were they out so

short a time? We need to touch bases with the attorney who cited juror misconduct during her representation of the client, to see what she knows about the jurors. Then, we may need to interview the jurors. (30.0 hours)

APPENDIX O

EXHIBIT "AA"

Affidavit of Zoila Corea, dated October 16, 1998

* * *

DECLARACION JURADA DE ZOILA COREA

ESTADO DE TEXAS
CONDADO DE HARRIS

Mi nombre es Zoila Corea, soy mayor de edad y lo suficienternente competente para hacer esta declaración. Soy de nacionalidad Hondureña y resido permanentemente en la ciudad de San Pedro Sula, Honduras. Soy la madre de Dennis Humberto Zelaya, quien actualmente se encuentra condenado a la pena do muerte en Huntsville bajo el nombre de "Carlos Manuel Ayestas". Actualmente me estoy hospedando en una iglesia en Spring, Texas con visa temporal.

Dennis Humberto Zelaya nació el 2 de Julio de 1969, pero su nacimiento no fue registrado hasta mas tarde en el mes de Julio durante el mismo año. Dennis nació on un hospital público en Tegucigalpa, la cual es la capital de Honduras. Fue un embarazo normal de nueve meses y no se presentaron ningunas complicaciones durante su nacimiento. La niñez de Dennis fue normal; el aprendió a hablar y a caminar en edad normal, El era un nifio rnuy activo. Mi esposo y yo no tuvimos problemas rnaritales y siempre vivimos juntas durante el crecimiento y desarrollo de Dennis y mis otros hijos. Los primeros dace altos de vida de Dennis, vivimos en la eluded do

Tegucigalpa, alli manejamos un negocio pequeño y viviarnos en el niismo edificio del negccio. Mi esposo y ye siempre estuvimos presences y asumimos la responsablidad de criar a nuestros hijos. Yo cocinaba a la familia todo el tiempo. Dennis tiene una hermana mayor, Xiomara, que es asistente legal en Honduras y tiene tres hermanas menores, Blanca, quien es estudiante universitaria; Ruth Melany, quien se encuentra estudiando la carrera de Medicina y Nolvia Maritza, quien estudia Ingenieria. Dennis creció un tin ambiente estable de clase media. Fue criado con bastante apoyo en su hogar. (Mi esposo ha sido casado anteriormente y los hijos de su primer matrimonio mantienen buenas relaciones con Dennis y sus hermanas, lo cual no es usual en Honduras.)

Dennis fue un niñio sano, y no sufrió lesiones a enferrnedades graves. Siempre mantuvo una buena relación con sus hermanas, Nunca pelió con sus hermanas ni les levantó el tono de voz. Siempre fue un hijo bien educado, quien nos obedeció y nos respetó. Dennis y su hermana, menor, Blanca, jugaban, ya que solo tiene una diferencia de tres años. Nunca les permitimos jugar fuera de nuestra case. En Honduras, los niños se quedan en la case y los amigos vienen a jugar a la casa. El castigo corporal no the utilizado en nuestro hogar, en ocasiones mi esposo le pegó a Dennis para disciplinarlo, pero sin violencia alguna. La forma usual de castigo era sencillamente el dialogo con los niños, y se les negaba el derecho a ver la television. No hobo abuso fisico o sexual de los niños. Dennis vivió en casa justo hasta el tiempo en el cual el se fue de Honduras.

Durante su primaria Dennis asistió a una escuela piiblica en Tegucigalpa. Cuando Dennis tenia como doce añ de edad, nos mudarnos a la ciudad de San Pedro Sula en donde comenzamos, un negocio pequeño. Dennis asistió a la secundaria en una escuela, privada en San Pedro Sula en donde estudió Contaduria Pública. Siempre obtuvo buenas calificaciones y no tuvo problemas de aprendizaje y nunca reprobó ningún grado academico. Dennis creció con enseñanza de la Iglesia Católica, asistiá. a misa todas las semanas y era devote a sus creencias. Durante su estadia en Honduras, Dennis nunca violó ninguna ley ni estuvo involucrado en ningún tipo de problema.

Dennis abandonó la casa a la edad de 18 años, informándonos que se dirigia a Guatemala. Después que se fue, se encontró una nota en su cuarto donde decia que se habia ido a Estados Unidos. La famila se sorprendió y se angustió. La primera vez quo Dennis vino a Estados Unidos fue solaxnente por unos pocos meses y luego regresó a Honduras. Despuós de esa visita él no mostró intents de regresar a Estados Unidos y comenzó a trabajar en negocios familiares. Luego decidió regresar a Estados Unidos. Dennis viajó a Estados Unidos come tres veces. Cada vez que regresaba a Honduras la familia esperaba que else quedara.. Siempre que regresaba de Estados Unidos él se hospedaba en la casa. La ultima vez que regreso a Honduras, en 1994, el pidió a la familia quo si alguien lo buscaba que dijeran que no estaba ahi, parecia que estaba alli. Parecia que estaba evitando a alguien. Posteriormente, el Sr. Federico Zaldivar comenzó a llegar a la easa, y era a él a quien Dennis

evitaba. No quisimos darle ninguna infbnuación sobre Dennis y le pedimos que no lo buscara más. Todos recordamos a Zaldivar como mala influencia para Dennis.

En Junio de 1997, fue cuando la familia recibió noticias del arresto y del juicio do Dennis. El 18 de Junio 1997, mi hija, Xiomara, recibió carta de la Sra. Olvera en donde informaba que Dennis tenia cargos paraira juicio en un caso de pena capital, La carta de la Sra. Olvera estaba con fecha del 9 de Junio, 1997, comunicándonos que el juicio comenzaria el 7 de Julio de 1997. Una vez que recibimos la carta, inmediatarnente nos contactamos por teléfono con la Sra. Olvera, y seguimos en contacto dia tras dia. La. Sra. Olvera deseaba que por lo menos Xiomara y yo estuvieramos presente en el juicio pars testificar y esperabamos una carta que nos iba a mandar via fax para llevarla a la Embajada Estados Unidos en Tegucigalpa explicando la urgencia de la situación y la necesidad de visa para viajar y presenciar el juicio. Sin embargo, nunca recibimos el Fax y e17 de Julio fulmos a la Embajada a tratar de obtener visa sin ninguna carta de la Sra. Olvera pero se nos fue negada. Se nos dijo que necesitabamos una carta de ella explicando la situacion y la necesidad de nuestra presencia en Houston. La familia más tarde logró obtener visas, pero ya era demasiado tarde porque el juicio habla terrninado.

Si los miembros de la familia hubiesen estado presente en el juicio, se hubiera testificado lo que anteicorrnente he dicho sobre los antecedentes y el caracter de Dennis, Tambien se hubiera testificado que "Carlos Manuel Ayestas" es la misma persona con Dennis Humberto Zelaya freflejado en los

documentos de Honduras, los cuales actualmente estaban en posesion del abogado defensor en el momento del juicio, pero que no pudieron introducir, demostrando qua Dennis no tiene record criminal de ninguna clase en Honduras.

/s/ Zoila A. Corea

ZOILA COREA

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

AFFIDAVIT OF ZOYLA COREA

STATE OF TEXAS *
*
COUNTY OF HARRIS *

My name is Zoyla Corea. I am over the age of eighteen, and am competent in all respects to make this oath. I am a Honduran National, and my permanent residence is in San Pedro Sula, Honduras. I am the mother of Dennis Humberto Zelaya, who is currently on Texas's death row in Huntsville under the alias "Carlos Manuel Ayestas." At the present time I am staying with a church in Spring, Texas, on a temporary visa.

Dennis Humberto Zelaya was born on July 2, 1969, although his birth was not recorded until later in July of that year. He was born in a public hospital in Tegucigalpa, which is the capitol city of Honduras. It was a normal, full-term pregnancy, with no complications during the birth. Dennis's early development was normal; he learned to walk and talk at normal ages. He was an active child. My husband and I had no marital problems, and always lived together while Dennis and his sisters were growing up. For the first twelve years of Dennis's life, the family lived in Tegucigalpa. There we ran a small business, and we lived in the same building. My husband and I were always present, and shared the responsibility of raising the children. I cooked for the family all the time. Dennis has one older sister, Xiomara, who is now a legal assistant in Honduras. He also has three younger sisters, Blanca, who is a university student, Ruth Melany, who is studying medicine, and Nolvia Maritza, who

is studying engineering. Dennis grew up in a stable, middle class background. He was raised in a good, supportive home environment. (My husband had been married once before, but the children of his first marriage had a good relationship with Dennis and his siblings, which is unusual for Honduras.)

Dennis was a healthy child, and suffered no major injuries or illnesses. He always got along well with his siblings. He never fought with them, or even raised his voice. He was a well-mannered son, who always obeyed his parents and never talked back to us. Dennis and his younger sister, Blanca, were playmates, only three years apart in age. We never let them play outside of our own house and yard. In Honduras, children stay close to home, and friends come over to the house to play. Corporal punishment was not common in our household. On occasions my husband would strike Dennis to discipline him, but not with violence. The usual form of punishment was simply to talk to the children, and sometimes to deprive them of television privileges. There was no physical or sexual abuse of the children. Dennis lived at home right up until the time he left Honduras.

Dennis attended a public grade school in Tegulcigalpa. When Dennis was about twelve years old, the family moved to San Pedro Sula, where we started another small business. Dennis went to a private high school in San Pedro Sula, where he studied accounting. He always received above average grades, had no discernable learning disorders, and was never held back in school. Dennis grew up in the Catholic Church. Dennis went to mass every week, and was sincere and

devout in his beliefs. Dennis never broke the law or got into any kind of trouble whatsoever while growing up in Honduras.

Dennis first left home when he was eighteen. He told the family he was going to Guatemala. But after he left we found a note in his room saying he had gone to the U.S. instead. The family was very much surprised and upset. The first time Dennis came to the U.S., he stayed only a few months, then came back to Honduras. He gave no indication of any intent to go back to the U.S. after that, and he worked in the family business for a while. But then Dennis decided to go back to the U.S. He traveled back and forth about three times. Each time he returned to Honduras, the family always expected that he would stay. When he would come back from the U.S., he always lived at home. The last time Dennis returned to Honduras, in 1994, he told the family that if someone came looking for him, to say he was not there, He seemed to be avoiding somebody. Federico Zaldivar then began to come by the house, asking where he could find Dennis, and he was the one that Dennis was avoiding. We refused to tell him anything about Dennis, and begged him to leave him alone. We all regarded Zaldivar as a bad influence on Dennis.

The family did not receive word of Dennis's arrest and trial in Houston until late in June of 1997. On June 18, 1997, my daughter, Xiomara, received a letter from Diana Olvera informing her that Dennis was soon to stand trial for capital murder in Houston, Texas. This is the first occasion that anyone in the family was informed that Dennis had been charged with capital murder. The letter from

Ms. Olvera was dated June 9, 1997, and informed us that the trial was set to begin on July 7, 1997. Once we received the letter, we contacted Ms. Olvera immediately, and communicated with her by telephone every day after that. Ms. Olvera wanted at least to have Xiormara and myself come to Houston to testify at the punishment phase of Dennis's trial. It was our understanding that Ms, Olvera was going to fax us a letter to take to the U. S. Embassy in Tegucigalpa, explaining the urgency of the situation and the need to grant us visas to allow us to travel to Houston for the trial. However, we never received such a fax. On July 7, 1997, we went to the U. S. Embassy to try to obtain visas without a letter from Ms. Olvera, but were denied visas. We were told that a letter was required from Ms. Olvera explaining the situation and the need for our presence in Houston. The family later got approval for visas, but not until July 31, 1997, by which time the trial was long over.

Had members of the family been present at the trial, we could and would have testified to the facts set out above about Dennis's background and character. We also could and would have testified that "Carlos Manuel Ayestas" is the same Dennis Humberto Zelaya reflected in the documents from Honduras, which the defense lawyers had in their possession at the punishment phase of trial, but were not able to introduce, demonstrating that Dennis had no criminal record of any kind in Honduras.

/s/ Zoila A. Corea
Zoyla Corea

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

CERTIFICATE OF TRANSLATOR'S COMPETENCE

I, **DAX VENEGAS**, hereby certify that the above is an accurate translation of the original "AFFIDAVIT OF ZOILA COREA" in Spanish and that I am competent in both English and Spanish to render such translation.

Date: October 16, 1998

/s/ Dax Venegas
(Signature of translator)

APPENDIX P

EXHIBIT "BB"

Affidavit of Xiomara Zelaya, dated October 16, 1998

* * *

DECLARACION JURADA DE XIOMARA ZELAYA

ESTADO DE TEXAS
CONDADO DE HARRIS

Mi nombre es Xiomara Zelaya. Soy mayor de dieciocho años y lo suficientemente competente para hacer ésta declaración jurada. Soy de. nacionalidad Hondureña y resido permanentemente en la ciudad de San Pedro Sula, Honduras. Soy la hermana mayor de Dennis Humberto Zelaya, quien actualrnente se encuentra condenado a la pena de muerte en Huntsville bajo el nombre de "Carlos Manuel Ayestas". Soy asistente legal, pero en el tiernpo presente me estoy hospedando en una iglesia en Spring, Texas con visa temporal.

Dennis Humberto Zelaya nació el 2 de Julio de 1969, pero su nacimiento no fue registrado hasty mas tarde en el mes de Julio durante el mismo año. Dennis nació en un hospital público en Tegucigalpa, la cual es la capital de Honduras. Fue un embarazo normal de nueve meses y no se presentaron ningunas complicaciones durante su nacimiento. La niñiez de Dennis fue normal; el aprendió a hablar y a caminar en edad normal. El era un niño muy activo. Nuestros padres nunca tuvieron problemas matrimoniales y siempre vivieron juntos durante el proceso de crecimiento mío y de Dennis. Los primeros doce años de vida de Dennis, mi familia

vivió en la ciudad de Tegucigalpa. Durante ese tiempo nuestros padres manejaron un negocio pequeño y vivíamos en el misino edificio del negocio. Ambos padres siempre estuvieron presentes con nosotros y asumieron la responsabilidad de criarnos comió hijos. Nuestra madre siempre nos preparad nuestra comida en casa. Dennis tiene tres hermanas, incluyendo a Blanca, quien es estudiante universitaria; Ruth Melany, quien se encuentra estudiando la carrera de Medicina y Nolvia Maritza, quien estudia Ingenieria. Dennis creció en un ambiente estabie de clase media. Fue criado con bastante apoyo en su hogar. (Nuestro padre estuvo previamente casado una vez pero los niños de su primer matrimonio mantienen una buena relación con Dennis y sus hermanas,)

Dennis fue un niño sano. y no sufrió de enfermedades graves. Siempre mantuvo una buena relación con sus hermanas. Nunca pelió con nosotros y ni siquiera nos levantó el tono de voz. Siempre fue un hijo biern educado y nunca le contesto mal a miis padres. En nuestra casa no era comun el que fueramos castigados por nuestros padres mediante golpes. En ocasiones, nuestro padre le pegaba a Dennis para disciplinarlo. pero sin violencia alguna. La forma usual de castigarnos era sencillamente hablando con nosotros, y nos quitaba el derecho a ver la televisión, No hubo abuso fisico a sexual de los niño. Dennis vivió en casa junto hasta el tiempo en que se fue de Honduras.

Durante su primaria Dennis asistió a una escuela pública en Tegucigalpa. Cuando Dennis tenia como doce años de edad, la familia se mudó a la ciudad de San Pedro Sula en la cual nuestros padres

empezaron un pequeño negocio. Dennis asistió a la secundaria en una escuela privada en San Pedro Sula en donde estudió Contaduria Pública. Siempre obtuvo buenas calificaciones y no tuvo problemas de aprendizaje y nunca reprobó ningún grade academico. Dennis creió con enseñanza católica, asistià a misa todas las semanas y era devoto a sus creencias. Durante su estadià en Honduras, Dennis nunea violó ninguna ley ni estuvo involucrado en ningún tipo de problema,

Dennis se fue de la casa a la edad de 18 años. El informó a su familia quo se dirigirá a Guatemala. Después que se fue, se le encontró una nota en su cuarto donde decía quo se habla ido a Estados Unidos. La famila se sorprendió y se angustió. La primera vez quo Dennis vino a Estados Unidos fue solamente por unos pocos mesas y luego regresó a Honduras. Después de esa visita el no mostró intento de regresar a Estados Unidos y comenzó a trabajar en negocios familiares. Luego decidió regresar a Estados Unidos. Dennis viajó a Estados Unidos como tres veces. Cada vez que regresaba a Honduras la familia esperaba que él se quedara. Siempre que regresaba de Estados Unidos él se hospedaba en la casa. La ultima vez que regreso a Honduras, en 1994, él pidió a la familia que si alguien lo buscaba que dijeran que no estaba alli, Parecia que estaba evitando a alguien. Posteriormente, el Sr. Federico Zaldivar comenzó a llegar a la casa, y era a él. a quien Dennis evitaba. No quisimos darle ninguna información sobre Dennis y le pedimos que no lo buscara más. Todos recordamos a Zaldivar como mala influencia para Dennis.

Yo fui el primer miembro de la familia que recibió noticias sobre el arresto y juicio de Dennis en Houston. El 18 de Junio 1997, recibí carta de Diana Olvera informando que Dennis iria a juicio en un caso de pena de muerte en Houston, Texas. Esta fue la primera ocasión que se le informaba a la familia que Dennis presentaba cargos de pena de muerte. La carta de la Sra. Olvera estaba con fecha del 9 de Junio, 1997, comunicándonos que el juicio comenzaria el 7 de Julio de 1997. Una vez que recibimos la carta, inmediatamente nos contactamos por teléfono con la Sra. Olvera, y seguimos en contacto dia tras dia. La Sra. Olvera deseaba que por lo menos mi madre y yo estuvieramos presente en el juicio para testificar y esperabamos una. carta que nos iba a mandar via fax para llevarla a la Embajada de Estados Unidos en Tegucigalpa explicando la urgencia de la situación y la necesidad de visa para viajar y presenciar el juicio. Sin embargo, nunca recibimos el fax y el 7 de Julio fuimos a la Embajada a tratar de obtener visa sin ninguna carta de la Sra. Olvera pero se nos fue negada. Se nos dijo que necesitábamos una carta de ella explicando la situación y la necesidad de nuestra presencia. La familia más tarde logró obtener visas, pero ya era demasiado tarde porque el juicio habia terminado.

Si miembros de la familia hubiesen estado presente en el juicio, se hubiera testificado lo que anteriormente he dicho sobre los antecedentes y el caracter de Dennis. Tambien se hubiera testificado quo "Carlos Manuel Ayestas" es la misma persona con Dennis Humberto Zelaya reflejado en los documentos do Honduras, los cuales actualmente estaban en posesión del abogado defensor en el

momento del juicio, pero quo no pudieron introducir, demostrando qua Dennis no tiene record criminal de ninguna clase en Honduras.

/s/ Xiomara Zelaya
XIOMARA ZELAYA

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

AFFIDAVIT OF XIOMARA ZELAYA

STATE OF TEXAS *
*
COUNTY OF HARRIS *

My name is Xiomara Zelaya. I am over the age of eighteen, and am competent in all respects to make this oath. I am a Honduran National, and my permanent residence is in San Pedro Sula, Honduras. I am the older sister of Dennis Humberto Zelaya, who is currently on Texas's death row in Huntsville under the alias "Carlos Manuel Ayestas." I am a legal assistant in Honduras, but at the present time I am staying with a church in Spring, Texas, on a temporary visa.

Dennis Humberto Zelaya was born on July 2, 1969, although his birth was not recorded until later in July of that year. He was born in a public hospital in Tegucigalpa, which is the capitol city of Honduras. It was a normal, full-term pregnancy, with no complications during the birth. Dennis's early development was normal; he learned to walk and talk at normal ages. He was an active child. Our parents had no marital problems, and always lived together while Dennis and I were growing up. For the first twelve years of Dennis's life, the family lived in Tegucigalpa. There our parents ran a small business, and we lived in the same building. Both our parents were always present, and shared the responsibility of raising the children. Our mother cooked for the family all the time. Dennis has three younger sisters, including Blanca, who is a university student, Ruth Melany, who is studying medicine, and Nolvia Maritza, who is studying

engineering. Dennis grew up in a stable, middle class background. He was raised in a good, supportive home environment. (Our father had been married once before, but the children of his first marriage had a good relationship with Dennis and his siblings, which is unusual for Honduras.)

Dennis was a healthy child, and suffered no major injuries or illnesses. He always got along well with his siblings. He never fought with us, or even raised his voice, He was a well-mannered son, who always obeyed his parents and never talked back to them. Corporal punishment was not common in our household. On occasions our father would strike Dennis to discipline him, but not with violence. The usual form of punishment was simply to talk to the children, and sometimes to deprive them of television privileges. There was no physical or sexual abuse of the children. Dennis lived at home right up until the time he left Honduras.

Dennis attended a public grade school in Tegucigalpa. When Dennis was about twelve years old, the family moved to San Pedro Sula, where our parents started another small business. Dennis went to a private high school in San Pedro Sula, and studied accounting. He always received above average grades, had no discernable learning disorders, and was never held back in school, Dennis grew up in the Catholic Church. He went to mass every week, and was sincere and devout in his beliefs. Dennis never broke the law or got into any kind of trouble whatsoever while growing up in Honduras.

Dennis first left home when he was eighteen. He told the family he was going to Guatemala. But after

he left we found a note in his room saying he had gone to the U.S, instead. The family was very much surprised and upset. The first time Dennis came to the U.S., he stayed only a few months, then returned to Honduras. He gave no indication of any intent to go back to the U.S. after that, and he worked in the family business for a while. But then Dennis decided to go back to the U.S. He traveled back and forth between Honduras and the U.S. about three times. Each time he returned to Honduras, the family always expected that he would stay. When he would come back from the U.S., he always lived at home. The last time Dennis returned to Honduras, in 1994, he told the family that if someone came looking for him, to say he was not there. He seemed to be avoiding somebody. Federico Zaldivar then began to come by the house, asking where he could find Dennis, and he was the one that Dennis was avoiding. We refused to tell him anything about Dennis, and begged him to leave him alone. We all regarded Zaldivar as a bad influence on Dennis.

I was the first member of the family to receive word about Dennis's arrest and trial in Houston. On June 18, 1997, I received a letter from Diana Olvera informing me that Dennis was soon to stand trial for capital murder in Houston, Texas. This is the first occasion that anyone in the family was informed that Dennis had been charged with capital murder. The letter from Ms. Olvera was dated June 9, 1997, and informed me that the trial was set to begin on July 7, 1997. Once we received the letter, the family contacted Ms. Olvera immediately, and communicated with her by telephone every day after that. Ms. Olvera wanted at least to have me and our mother come to Houston to testify at the punishment

phase of Dennis's trial. It was our understanding that Ms. Olvera was going to fax us a letter to take to the U. S. Embassy in Tegucigalpa, explaining the urgency of the situation and the need to grant us visas to allow us to travel to Houston for the trial. However, we never received such a fax. On July 7, 1997, we went to the U. S. Embassy to try to obtain visas without a letter from Ms. Olvera, but were denied visas. We were told that a letter was required from Ms. Olvera explaining the situation and the need for our presence in Houston. The family later got approval for visas, but not until July 31, 1997, by which time the trial was long over.

Had members of the family been present at the trial, we could and would have testified to the facts set out above about Dennis's background and character. We also could and would have testified that "Carlos Manuel Ayestas" is the same Dennis Humberto Zelaya reflected in the documents from Honduras, which the defense lawyers had in their possession at the punishment phase of trial, but were not able to introduce, demonstrating that Dennis had no criminal record of any kind in Honduras.

/s/ Xiomara Zelaya
Xiomara Zelaya

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

CERTIFICATE OF TRANSLATOR'S COMPETENCE

I, **DAX VENEGAS**, hereby certify that the above is an accurate translation of the original "AFFIDAVIT OF XIOMARA ZELAYA" in Spanish and that I am competent in both English and Spanish to render such translation.

Date: October 16, 1998

/s/ Dax Venegas
(Signature of translator)

APPENDIX Q

EXHIBIT "CC"

(Affidavit of Blanca Zelaya, dated October 16, 1998)

* * *

DECLARACION JURADA DE BLANCA ZELAYA

ESTADO DE TEXAS
CONDADO DE HARRIS

Mi nombre es Blanca Zelaya. Soy mayor de dieciocho años y lo suficientemente competente para hacer ésta declaración jùrada. Soy de nacionalidad Hondureña y resido permanentemente en la ciudad de San Pedro Sula, Honduras. Soy la hermana menor de Dennis Humberto Zelaya, quien actualmente se encuentra condenado a pena de muerte en Huntsville bajo el nombre de "Carlos Manuel Ayestas." Soy estudiante universitaria en Honduras, y actualmente me estoy hospedando en una iglesia en Spring, Texas con visa temporal.

Dennis Humberto Zelaya nació el 2 de Julio de 1969, pero su nacimiento no fue registrado hasta mas tarde en el mes de Julio durante el mismo año. La niñez de Dennis fue normal; el aprendió a hablar y a caminar en edades normales. El era un niño muy activo. Nuestros padres nunca, tuvieron problemas matrimoniales y siempre vivieron juntos durante el proceso de crecimiento mío y de Dennis. Los primeros doce años de vida de Dennis, mi familia vivió en la ciudad de Tegucigalpa. Durante ese tiempo nuestros padres manejaron un negocio pequeño y vivíamos en el mismo edificio del negocio. Ambos padres siempre estuvieron presentes con

nosotros y asumieron la responsabilidad de criarnos coma hijos. Nuestra madre siempre nos preparó nuestra comida en casa. Dennis tiene una hermana mayor, Xiomara, que actualmente es asistente legal en Honduras. Tambien tiene a otra hermana menor, Ruth Melany, quien se encuentra estudiando la carrera de Medicina y otra menor, Nolvia Maritza, que estudia Ingenieria. Dennis creció en un ambiente estable de clase media. Fue criado con bastante apoyo en su hogar. (Nuestro padre estuvo previamente casado una vez, pero los niños de su primer matrimonio mantienen una buena relación con Dennis y sus hermanas.)

Dennis fue un niño sano, y no sufrió lesiones o enfermedades graves. Siempre mantuvo una buena relación con sus hermanas. Nunca pelió con nosotros y nisiquiera nos levantó el tono de voz. Siempre fue un hijo bien educado y nunca le contesto mal a mis padres. Dennis y yo siempre jugábamos dado a que solo teníamos una diferencia de tres años de edad. Nuestras padres nunca nos dejaron jugar fuera de nuestra casa. En Honduras, los niños siempre están cerca de la casa, y los amigos viene a jugar a la casa. En nuestra case el castigo corporal no fue común. En ocasión, nuestro padre le pegaba a Dennis para disciplinarlo, pero sin violencia alguna. La forma usual de castigarnos era sencillamente hablando con nosotros, y nos quitaba el privilegio de ver la televisión. No hubo abuso físico o sexual de los niños. Dennis vivió en casa durante su estadía en Honduras.

Durante su primaria Dennis asistió a una, escuela pública en Tegucigalpa, Cuando Dennis tenia como doce años de edad, la familia se mudo a la

ciudad de San Pedro Sula en la cual nuestros padres empezaron un negocio pequeño. Dennis asistió a la secundaria en una escuela privada en San Pedro Sula en donde estudió Contaduría Pública. Siempre obtuvo buenas calificaciones y no tuvo problemas de aprendizaje y nunca reprobó ningún grado académico. Dennis creció con enseñanza católica, asistía a misa todas las semanas y era devoto a sus creencias. Durante su estadía en Honduras, Dennis nunca violó ninguna Ley ni estuvo involucrado en ningún tipo de problema.

Dennis se fue do la casa a la edad de 18 años. El le dijo a su familia que se dirigía a Guatemala. Despues que se fue se encontró una nota en su cuarto donde decía que se había ido a Estados Unidos. La famila se sorprendió y se angustió. La primera vez que Dennis vino a Estados Unidos fue solamente por unos pocos meses y luego regresó a Honduras. Despues de esa visita él no mostró intento de regresar a Estados Unidos y comenzó a trabajar en negocios familiares. Luego decidió regresar a Estados Unidos. Dennis continuó viajando Estados Unidos-Honduras aproximadamente tres veces. Cada vez que regresaba a Honduras la familia esperaba que él se quedara. Siempre quo regresaba de Estados Unidos él se hospedaba en la casa. La ultima vez que regreso a Honduras, en 1994, él pidió a la familia que si alguien lo buscaba que dijeran que no estaba ahí. Parecía quo estaba evitando a alguien, Posteriormente, el Sr. Federico Zaldívar comenzó a llegar a la casa preguntando por él, y era a él a quien Dennis evitaba. No quisimos darle ninguna información sobre Dennis y le pedimos que no lo buscara más. Todos recordamos a Zaldívar como mala influencia para. Dennis.

Yo estudiaba en la Universidad en San Pedro Sula cuando mi familia se enteró del arresto de Dennis y del juicio en Houston. El 18 de Junio, mi hermana, Xiomara, recibió una carta de Diana Olvera informando que Dennis iría a juicio en un caso de pena de muerte en Houston. Texas. Esta fue la primera ocasión que se le informaba a la familia sobre la situación de Dennis. La carta de la Sra. Olvera estaba con fecha del 9 de Junio, 1997, comunicándonos que el juicio comenzaría el 7 de Julio de 1997. Una vez que recibimos la carta, inmediatamente nos contactamos per teléfono con la Sra. Olvera, y seguimos en contacto día tras día. La Sra. Olvera deseaba que por lo menos Xiomara y nuestra madre estuvieran presente en el juicio para testificar y esperabamos una carta que nos iba a mandar vía fax para llevarla a la Embajada de Estados Unidos en Tegucigalpa explicando la urgencia de la situación y la necesidad de visa para viajar y presenciar el juicio. Sin embargo, nunca recibimos el Fax y el 7 de Julio fuimos a la Embajada a tratar de obtener visa sin ninguna carta de la Sra. Olvera pero se nos fue negada. Se nos dijo que necesitabamos una carta de ella explicando la situación y la necesidad de nuestra presencia. La familia más tarde logró obtener visas, pero ya era demasiado tarde porque el juicio labia terminado.

Si los miembros de la familia hubiesen estado presente en el juicio, se hubiera testificado lo que anteriormente he dicho sobre los antecedentes y el caracter de Dennis. Tambien se hubiera testificado quo "Carlos Manuel Ayestas" es la misma persona con Dennis Humberto Zelaya reflejado en los documentos de Honduras, los cuales actualmente estaban en posesión del abogado defensor en el

momento del juicio, pero que no pudieron introducir, demostrando que Dennis no timene record criminal de ninguna clase en Honduras.

/s/ Blanca Zelaya
BLANCA ZELAYA

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

AFFIDAVIT OF BLANCA ZELAYA

STATE OF TEXAS *
*
COUNTY OF HARRIS *

My name is Blanca Zelaya. I am over the age of eighteen, and am competent in all respects to make this oath. I am a Honduran National, and my permanent residence is in San Pedro Sula, Honduras. I am the younger sister of Dennis Humberto Zelaya, who is currently on Texas's death row in Huntsville under the alias "Carlos Manuel Ayestas." I am a university student in Honduras, but at the present time I am staying with a church in Spring, Texas, on a temporary visa.

Dennis Humberto Zelaya was born on July 2, 1969, although his birth was not recorded until later in July of that year. Dennis's early development was normal; he learned to walk and talk at normal ages. He was an active child. Our parents had no marital problems, and always lived together while Dennis and I were growing up. For the first twelve years of Dennis's life, the family lived in Tegucigalpa. There our parents ran a small business, and we lived in the same building. Both our parents were always present, and shared the responsibility of raising the children. Our mother cooked for the family all the time. Dennis has one older sister, Xiomara, who is now a legal assistant in Honduras. He also has a younger sister, Ruth Melany, who is currently studying medicine, and another younger sister, Nolvia Maritza, who is studying engineering. Dennis grew up in a stable, middle class background. He was raised in a good, supportive home environment. (Our father had been married once before, but the

children of his first marriage had a good relationship with Dennis and his siblings, which is unusual for Honduras.)

Dennis was a healthy child, and suffered no major injuries or illnesses. He always got along well with his siblings. He never fought with us, or even raised his voice. He was a well-mannered son, who always obeyed his parents and never talked back to them. Dennis and I were playmates, only three years apart in age. Our parents never let us play outside of our own house and yard. In Honduras, children stay close to home, and friends come over to the house to play. Corporal punishment was not common in our household. On occasions our father would strike Dennis to discipline him, but not with violence. The usual form of punishment was simply to talk to the children, and sometimes to deprive them of television privileges. There was no physical or sexual abuse of the children. Dennis lived at home right up until the time he left Honduras.

Dennis attended a public grade school in Tegucigalpa. When Dennis was about twelve years old, the family moved to San Pedro Sula, where our parents started another small business, Dennis went to a private high school in San Pedro Sula, and studied accounting. He always received above average grades, had no discernable learning disorders, and was never held back in school. Dennis grew up in the Catholic Church. He went to mass every week, and was sincere and devout in his beliefs. Dennis never broke the law or got into any kind of trouble whatsoever while growing up in Honduras.

Dennis first left home when he was eighteen. He told the family he was going to Guatemala. But after he left we found a note in his room saying he had gone to the U.S. instead. The family was very much surprised and upset. The first time Dennis came to the U.S., he stayed only a few months, then returned to Honduras. He gave no indication of any intent to go back to the U.S. after that, and he worked in the family business for a while. But then Dennis decided to go back to the U.S. He traveled back and forth between Honduras and the U.S. about three times. Each time he returned to Honduras, the family always expected that he would stay. When he would come back from the U.S., he always lived at home. The last time Dennis returned to Honduras, in 1994, he told the family that if someone came looking for him, to say he was not there. He seemed to be avoiding somebody. Federico Zaldivar then began to come by the house, asking where he could find Dennis, and he was the one that Dennis was avoiding. We refused to tell him anything about Dennis, and begged him to leave him alone. We all regarded Zaldivar as a bad influence on Dennis.

I was a student at the University in San Pedro Sula when the family got word about Dennis's arrest and trial in Houston. On June 18, 1997, my sister, Xiomara, received a letter from Diana Olvera informing her that Dennis was soon to stand trial for capital murder in Houston, Texas. This is the first occasion that anyone in the family was informed that Dennis had been charged with capital murder. The letter from Ms. Olvera was dated June 9, 1997, and informed us that the trial was set to begin on July 7, 1997. Once we received the letter, we contacted Ms. Olvera immediately, and communicated with her by

telephone every day after that. Ms. Olvera wanted at least to have Xiomara and our mother come to Houston to testify at the punishment phase of Dennis's trial. It was our understanding that Ms. Olvera was going to fax us a letter to take to the U. S. Embassy in Tegucigalpa, explaining the urgency of the situation and the need to grant us visas to allow us to travel to Houston for the trial. However, we never received such a fax. On July 7, 1997, we went to the U. S. Embassy to try to obtain visas without a letter from Ms. Olvera, but were denied visas. We were told that a letter was required from Ms. Olvera explaining the situation and the need for our presence in Houston. The family later got approval for visas, but not until July 31, 1997, by which time the trial was long over.

Had members of the family been present at the trial, we could and would have testified to the facts set out above about Dennis's background and character. We also could and would have testified that "Carlos Manuel Ayestas" is the same Dennis Humberto Zelaya reflected in the documents from Honduras, which the defense lawyers had in their possession at the punishment phase of trial, but were not able to introduce, demonstrating that Dennis had no criminal record of any kind in Honduras.

/s/ Blanca Zelaya
Blanca Zelaya

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

CERTIFICATE OF TRANSLATOR'S COMPETENCE

I, **DAX VENEGAS**, hereby certify that the above is an accurate translation of the original "AFFIDAVIT OF BLANCA ZELAYA" in Spanish and that I am competent in both English and Spanish to render such translation.

Date: October 16, 1998

/s/ Dax Venegas
(Signature of translator)

APPENDIX R

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 72,928

CARLOS MANUEL AYESTAS, Appellant

v.

THE STATE OF TEXAS

DIRECT APPEAL
FROM THE 230th DISTRICT COURT
HARRIS COUNTY

Mansfield, J., delivered the opinion of the Court, in which McCormick, P.J., and Baird, Overstreet, Meyers, Keller, Price, Holland, and Womack, JJ., joined.

OPINION

On July 9, 1997, a Harris County jury found appellant, Carlos Manuel Ayestas, guilty of capital murder. See Tex. Penal Code § 19.03(a)(2). His conviction stemmed from a killing he committed on September 5, 1995.[1] At the punishment stage of trial, the jury answered the special issues in such a manner as to require the trial court to sentence appellant to death. See Art. 37.071 §§ 2(b),(e), &

[1] The State sought to convince the jury that appellant, and two other men, Frederico Zaldivar and Roberto Meza, were all involved in the murder of the victim.

(g).[2] Direct appeal to this Court is automatic pursuant to Article 37.071 § 2(h). Appellant brings twelve points of error to this Court, and, with the exception of those points alleging insufficient evidence, which will be discussed first, we will address each issue in the order in which it occurred at trial. We will affirm the judgment of the trial court.

The first point of error brought by appellant for our review asserts the evidence was legally insufficient in that "a rational trier of fact could never have found, beyond a reasonable doubt, that appellant committed all the essential elements of the offense charged." Appellant claims the evidence was insufficient to indicate he "personally committed the homicide in the course of a robbery or burglary, or that [he], in connection with the conduct of others, harbored a specific intent to promote or assist the commission of an intentional murder."

Texas Penal Code § 19.03(a)(2), the statutory provision under which appellant was charged and convicted, provides, in relevant part, that a person commits an offense if he "intentionally commits [a] murder in the course of committing, or attempting to commit, burglary [or] robbery. . . ." Texas Penal Code § 30.02 states that a person commits the offense of burglary if, without the effective consent of the owner, he: (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony; (2) remains concealed, with the intent to commit a felony or

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[2] All references to articles are to those in the Texas Code of Criminal Procedure.

theft, in a building or habitation; or (3) enters a building or habitation and commits or attempts to commit a felony or theft. Texas Penal Code § 29.02 states a person commits robbery if, in the course of committing theft, and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another; or intentionally, knowingly, or recklessly threatens or places another in fear of imminent bodily injury. In returning a general verdict of guilty of capital murder, the jury implicitly found appellant guilty of committing or attempting to commit burglary or, in the alternative, robbery.

To determine if appellant presents a meritorious argument, it is necessary to review both the circumstances of the crime and appellant's actions before and after its commission. The State presented nine witnesses and accompanying evidence to prove its case.[3] Anna McDougal, a neighbor who lived across the street from the victim in the northwest portion of Harris County, told the jury about an encounter appellant had with the victim in mid-August of 1995, approximately two weeks before the murder took place. McDougal had picked up two men, one of whom she identified as appellant, at a nearby apartment complex and drove them to her home so they could look at a car she was hoping to sell. Leaving the two men alone to inspect her car, McDougal went inside for approximately fifteen minutes. Upon returning outside, she looked across the street and saw appellant and the other man leaving the victim's house. McDougal inquired

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[3] Appellant presented no evidence at the guilt/innocence stage of trial.

about what the two men were doing, and they responded that the victim had called them over to look at some furniture she had been trying to sell. McDougal testified she then drove the men back to their apartment complex.

The victim's son, hereafter E.P., informed the jury he left the house between 8:30 a.m. and 8:35 a.m. on the day the crime took place. Upon returning home for lunch, he specifically noted the time as 12:23 p.m., and said he rang the doorbell, as was customary, but there was no response. E.P. then put his key in the doorknob and found the door was unlocked. After opening the door and walking inside, E.P. saw that the room had been ransacked and certain items were missing. A cursory inspection determined the remainder of the house was in much the same condition. E.P. then left and headed for a neighbor's house to call 9-1-1. He testified that he then called his employer and remained on the line as he walked back into his home. E.P. finally found his mother's body lying on the floor in the master bathroom, partially blocking the door. He could only see her from the waist down and observed silver duct tape encircling her ankles. E.P. fled to the same neighbor's house, and asked her to go back to make sure his mother was dead.

The neighbor, Maria Diaz, was called to the stand and testified that she walked into the victim's house, calling her name. She found the decedent face down on the floor and observed that her face was a dark color, and she was not breathing. Diaz testified on cross-examination that she had been home all morning and never saw any activity at the victim's household.

Detective Mark Reynolds, of the Harris County Sheriff's Department, took the stand and told the jury of his observations at the crime scene and his later attempts to track down those responsible. He described how the house itself appeared ransacked but bore no signs of forced entry. The victim was face down on the floor, and a pool of blood and vomit partially surrounded her head. Her wrists had been bound together with the electrical cord from an alarm clock and then wrapped in silver duct tape. This tape, as the victim's son had observed, also secured the victim's feet. A strip of it was placed across her eyes, and a substantial amount of tape also encircled the victim's neck. According to Detective Reynolds, it was apparent the decedent had been beaten. Her swollen face was covered with numerous cuts and bruises, and in his words, "something had made contact with her face with a lot of force." After talking with neighbors, including Anna McDougal, Detective Reynolds and his fellow officers developed leads pointing to potential suspects known only at that time as "Dennis" and "Rolando." Reynolds said he acquired photographs of these suspects, and they were positively identified by McDougal as the same men who had been at the victim's house approximately two weeks earlier. Detective Reynolds testified that the suspect "Dennis" was, in fact, appellant, and the suspect "Rolando" was Frederico Zaldivar, one of the two men eventually arrested with appellant.

The body of the decedent was taken to the office of the Harris County Medical Examiner, and the autopsy was performed by an assistant medical examiner, Dr. Marilyn Murr. Dr. Murr testified that the victim received numerous bruises and

lacerations from multiple blows inflicted while she was still alive. The bone in her right elbow had been fractured. Two bruises were discovered on each side of the pelvic area just above the hips. The internal examination revealed extensive hemorrhaging in the neck and head area. The hyoid bone in the neck had been fractured. Another fracture caused by a "significant amount of force" was discovered in the roof of the orbit containing her right eye. It was determined these injuries, however, were not substantial enough to cause death. The cause of death was asphyxiation due to continual pressure applied to the neck for three to six minutes. It was brought out on direct examination that the initial autopsy report had indicated the asphyxiation was caused by ligature strangulation (use of a belt or rope, for example), but, shortly before trial, at the request of the district attorney, Dr. Murr was asked to reexamine the evidence. As a result of this subsequent review, she changed her report to "asphyxiation due to strangulation" which left open the possibility a hand, or hands, might have been involved. In response to the State's inquiries, Dr. Murr gave her opinion that the hemorrhaging in the neck area occurred while the victim was alive and resulted from pressure placed upon her neck by either pulling on a length of tape that was attached to the tape around her neck or by placing a hand or hands directly on the tape around her neck.

The acquisition of fingerprints and other trace evidence was the responsibility of Harris County Deputy Sheriff Michael Holtke. He testified about his efforts to verify that the various lengths of tape that bound the victim all came from the same roll of tape that was found next to the body. This tape,

along with the entire crime scene, was also processed for latent fingerprints. This search of the house resulted in the discovery of fingerprints from the three individuals identified as suspects in the case, including four prints belonging to the appellant himself. Two latent prints were discovered on the tape from the decedent's ankles, and it was Holtke's opinion that these had sufficient characteristics to match the prints on appellant's right palm and left index finger. Holtke also found success matching two prints from appellant's right thumb to prints found on the roll of tape. On cross-examination, defense counsel brought to light the fact that the prints found on the tape around the victim's ankles[4] were only discovered shortly before trial, approximately twenty months after the first prints were identified as belonging to appellant. Just as the revision of the autopsy report by the pathologist was at the request of the district attorney's office, this subsequent re-examination of the latent prints was also at the D.A.'s request.

Henry Nuila, a resident of Kenner, Louisiana, was called by the State to tell the jury about the events leading up to appellant's capture. Over a two week period in mid-September of 1995, Nuila

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[4] There does appear to be some confusion with regard to which set of latent prints was identified shortly before trial, the two prints from the roll of tape or the two prints from the tape around the decedent's ankles. Appellant's brief suggests the prints on the tape around the ankles were discovered first. However, our review of the record indicates otherwise. It was in fact the latent fingerprints found on the roll of tape that were first identified on September 8th of 1995, as belonging to appellant. The prints on the tape around the victim's ankles were discovered June 12th and 18th of 1997.

encountered appellant and two other men at his sister's house in Kenner. Nuila knew appellant only as "Dennis" but accurately identified him at trial, in part, by a rose tattoo on appellant's right shoulder. Nuila and appellant engaged in a conversation that took place on September 20th while appellant was in an intoxicated state. According to Nuila's testimony, appellant told him about his involvement in the murder of a woman in Houston. Nuila went on to say appellant asked for his help to kill the other two men he was with because "they had spoken too much," and if Nuila chose not to help, appellant would have to kill him as well. It was at this point appellant brandished a gun in front of Nuila. Fearing for his life, Nuila managed to keep appellant talking until appellant passed out. As soon as Nuila felt it was safe to leave, he contacted the police and appellant, still in possession of the gun, was ultimately arrested.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt." *Tibbs v. Florida*, 102 S.Ct. 2211, 2220 (1982). Our guiding standard of review in determining the legal sufficiency of the evidence in a case consisting of either direct or circumstantial evidence calls upon this Court to determine whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 99 S.Ct. 2781, 2789 (1979); *Jones v. State*, 944 S.W.2d 642, 647 (Tex.Crim.App. 1996), *cert. denied*, 118 S.Ct. 100 (1997); *Robertson v. State*, 871 S.W.2d 701, 705

(Tex.Crim.App. 1993). In conducting such a review, we measure sufficiency "by the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Ctim.App. 1997). This standard of review is applied to each theory of the offense as submitted to the jury through the court's charge. *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex.Crim.App. 1992). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *Barnes v. State*, 876 S.W.2d 316, 321 (Tex.Crim.App.), *cert. denied*, 115 S.Ct. 174 (1994). And reconciliation of conflicts in the evidence is within the exclusive province of the jury. *Losada v. State*, 721 S.W.2d 305, 309 (Tex.Crim.App. 1986). When the jury returns a general verdict, as was done in this case, and the evidence is sufficient to support a guilty finding under any of the allegations submitted, the verdict will be upheld. *Rabbani v. State*, 847 S.W.2d at 558; *Fuller v. State*, 827 S.W.2d 919, 931 (Tex.Crim.App. 1992).

This is a crime prosecuted primarily on circumstantial evidence. No eyewitness testimony can place appellant at the crime scene the morning it occurred, but sufficient evidence exists that could lead a rational trier of fact to the conclusion that a murder occurred during the commission of a burglary and appellant was directly involved as a party. That some conflict existed with regard to the identification of the fingerprints or the official cause of death is immaterial for our immediate purposes. Jurors are the exclusive judges of the facts, and this Court is not to sit as a thirteenth juror re-evaluating the credibility or weight of the evidence. *Soria v. State*, 933 S.W.2d 46, 49 (Tex.Crim.App. 1996);

Abdnor v. State, 871 S.W.2d 726, 731 (Tex.Crim.App. 1994). We must assume the jury, as the final judge of the facts, resolved any conflict in favor of the verdict reached. See Arts. 36.13 & 38.04 The aforementioned evidence could indicate to a rational trier of fact that appellant used his prior relationship with the victim as a means to deceptively gain access to her house, which was found to have been ransacked and looted, and that he actively participated in the restraint of the victim. Appellant's fingerprints were found at the scene and, in particular, on the decedent herself, and he admitted his involvement in the crime to a third party. See *Patrick v. State*, 906 S.W.2d 481, 486 (Tex.Crim.App. 1995), *cert. denied*, 116 S.Ct.1323 (1997).

As mentioned, appellant also contends in this point of error that the evidence introduced at trial was insufficient to establish the necessary intent to commit murder. Intent can be inferred from the acts, words, and conduct of the accused. *Id., at 487; Robertson v. State*, 871 S.W.2d at 705. Perhaps the most damning evidence is the words of appellant just prior to his capture in Kenner, Louisiana. Appellant admitted, against his own personal interest, that he, or they, had murdered a woman in Houston. Appellant's statement could be construed to indicate personal involvement or participation as a party to a deliberate killing, and this could lead a rational trier of fact to the conclusion that appellant either murdered the victim or participated in the crime by promoting or assisting its commission. Appellant's first point of error is overruled.

Appellant's seventh point of error claims the

evidence was legally insufficient to support the jury finding that he would constitute a continuing threat to society. See Article 37.071 § 2(b)(1). The State is required to prove the issue of future dangerousness beyond a reasonable doubt, i.e., the burden was on the State to prove there existed a probability, as opposed to a mere possibility, that appellant would commit criminal acts of violence in the future, so as to constitute a continuing threat, whether in or out of prison. *Narvaiz v. State*, 840 S.W.2d 415, 425 (Tex.Crim.App. 1992), *cert. denied*, 113 S.Ct. 1422 (1993); *Smith v. State*, 779 S.W.2d 417, 421 (Tex.Crim.App. 1989); *Rougeau v. State*, 738 S.W.2d 651, 660 (Tex.Crim.App. 1987), *cert. denied*, 108 S.Ct. 1586 (1988). In its determination of the issue, the jury was entitled to consider all the evidence presented at both the guilt/innocence and punishment phases of the trial. *Valdez v. State*, 776 S.W.2d 162, 166-67 (Tex.Crim.App. 1989), *cert. denied*, 110 S.Ct. 2575 (1990). To determine whether sufficient evidence exists to support a jury's finding that there is a probability the defendant will commit criminal acts of violence that will constitute a continuing threat to society, this Court must examine all of the evidence in the light most favorable to its finding and determine whether based on that evidence, any rational jury could have found beyond a reasonable doubt, that the answer to the "future dangerousness" issue was "yes." *Matamoros v. State*, 901 S.W.2d 470, 474 (Tex.Crim.App. 1995); *Narvaiz v. State*, 840 S.W.2d at 425. The existence of a prior criminal record, and prior unadjudicated acts of violence against people and property have been held by this Court to constitute evidence of future dangerousness. *Moore v. State*, 935 S.W.2d

124, 126 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 1711 (1997); *Farris v. State*, 819 S.W.2d 490, 498 (Tex.Crim.App. 1990), *cert. denied*, 112 S.Ct. 1278 (1992). In fact, the circumstances of the offense itself, including the forethought, deliberateness and calculated nature, can provide ample indication appellant presents a sufficiently violent and continuing threat to society. *Williams v. State*, 937 S.W.2d 479, 483 (Tex.Crim.App. 1996); *Martinez v. State*, 924 S.W.2d 693, 696 (Tex.Crim.App. 1996); *Sonnier v. State*, 913 S.W.2d 511, 516-17 (Tex.Crim.App. 1995).

We have already discussed the circumstances of the crime itself. It is also necessary, however, to look at the State's evidence of appellant's future dangerousness presented during the punishment stage of trial. This consisted of testimonial and documentary evidence from the Texas criminal justice system and the California criminal justice system concerning appellant's criminal background. In addition, the State elicited the testimony of Candelario Martinez, who described an encounter he experienced with appellant just days after the murder in question.

We first look at appellant's criminal record in determining the societal threat he poses. Through California penal records, it was revealed that appellant received probation and a suspended sentence for possession, and purchase for sale, of narcotics. That probation was subsequently revoked after appellant was convicted on a burglary charge. Appellant was also the subject of a California warrant for the illegal transportation of aliens. In Texas, approximately two months prior to the

murder of which we now consider, appellant had also served a ten day sentence for misdemeanor theft.

As mentioned, the State also called Candelario Martinez to the stand to tell the jury about his experience with appellant three days after the murder. Martinez told how he was waiting for a friend outside a hotel in Harris County on September 8, 1995, when appellant approached and started to make conversation. After a brief discussion, appellant pulled out a gun and ordered Martinez into one of the hotel rooms, which also contained the friend for whom Martinez had been waiting. Martinez said he was ordered onto the floor as appellant made constant threats to kill him. Martinez's personal belongings were taken by appellant and two others in the room and then he was ordered into the bathroom where he was again informed he would be killed. Martinez begged for his life as his captors argued over who would actually carry out the killing. Ultimately, appellant said he would let Martinez live but threatened to return and kill his family if Martinez informed the police. Appellant and the others then left the scene in Martinez's truck.

As previously mentioned, the circumstances of the crime itself are probative in making this determination of future dangerousness. See *Williams v. State*, 937 S.W.2d at 483; *Martinez v. State*, 924 S.W.2d at 696. The evidence shows the victim in this case permitted appellant and his fellow suspects into her home only to have it ransacked and its contents taken and, she, herself, was bound with duct tape, beaten, and choked to death. The pathological evidence revealed this

beating caused extensive bruising on the victim's arms and legs, a broken bone in her elbow, and severe trauma to her head and neck evidenced by broken bones and internal bleeding. The culmination of this crime was then the strangulation death of a 67 year old woman for three to six minutes, which the jury found appellant either carried out personally or actively participated in.

The circumstances of the crime, taken into consideration with appellant's criminal background, and his actions during the encounter with Candelario Martinez, indicate that a rational jury could have found there is a probability appellant would commit criminal acts of violence in the future and constitute a continuing threat to society. Point of error number seven is overruled.

In his eighth point of error, appellant argues the trial court erred in accepting the jury's verdict pursuant to Article 37.071 § 2(b)(2) because the evidence was legally insufficient to support the finding that the appellant "actually caused the death of the deceased, or did not actually cause the death but intended to kill the deceased or another, or anticipated that a human life would be taken." Appellant contends that since the victim in this case was tied up and restrained before being murdered then the intent to murder was not made until after the burglary or robbery had actually commenced. In addition, appellant argues that since his prints were found only on the tape encircling the ankles of the deceased and on the roll of tape, there was insufficient evidence to indicate appellant was personally responsible for carrying out the strangulation of the victim. These alleged

inconsistencies, he argues, combined with what he considers questionable alterations in the reports by the pathologist and the fingerprint specialist, make the evidence insufficient to support the jury's finding under Article 37.071 § 2(b)(2), the "§ 2(b)(2)" charge.

Our guiding standard, as in all legal sufficiency reviews of the punishment stage, is whether, based on the evidence viewed in a light most favorable to the verdict, a rational jury could have found beyond a reasonable doubt that the answer to the § (2)(b)(2) charge was "yes." *Martinez v. State*, 924 S.W.2d at 696. Submission of the § (2)(b)(2) special issue is appropriate when a jury was permitted to find the defendant guilty as a party under Texas Penal Code §§ 7.01 & 7.02. Its goal is to ensure that the trier of fact, during punishment, considers only the actions of the defendant and does not sentence someone to death based upon the culpability of others. See *Enmund v. Florida*, 102 S.Ct. 3368 (1982). To even be subject to the provisions of Article 37.071 § 2(b), a defendant must have already been found guilty as a primary actor or as a party. See *Lawton v. State*, 913 S.W.2d 542, 555 (Tex.Crim.App. 1995), *cert. denied*, 117 S.Ct. 88 (1996); *McFarland v. State*, 928 S.W.2d 482, 517 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 966 (1997). Appellant freely admitted that he was directly involved in a Houston murder and stated his desire that his two cohorts be killed to keep them from revealing the circumstances of the crime. A jury could rationally infer from this statement that appellant "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased... or anticipated that a human life would be taken." Art. 37.071 § 2(b)(2). The evidence was sufficient to

support the jury's affirmative answer to the § (2)(b)(2) issue submitted during punishment. Point of error number eight is overruled.

Point of error number three claims the trial court erroneously denied a pre-trial motion to declare Article 37.071 § 2(b)(2) violative of the Eighth Amendment to the United States Constitution and also "contrary to state law." Appellant reasserts this issue on direct appeal. With regard to the federal claim of unconstitutionality, appellant argues that the phrase "anticipation that a human life be taken," Art. 37.071 § 2(b)(2), lowers the level of personal culpability necessary to receive a sentence of death, thus violating the Eighth Amendment proscription against cruel and unusual punishment. To support his position, appellant additionally argues the statute "requires the jury to find nothing more than [it was] required to find in order to convict a defendant of capital murder under the law of parties." The Supreme Court decisions from *Tison v. Arizona*, 107 S.Ct. 1676 (1987), and *Enmund v. Florida*, 102 S.Ct. 3368 (1982), are relied on as authority that the death penalty is not appropriate against a defendant who did not possess the appropriate intent.

This claim of unconstitutionality has been argued before, and it has been answered by this Court. Both *Tison and Enmund* are inapplicable in light of the circumstances of appellant's crime and conviction. At the guilt/innocence phase of trial, the jury was specifically charged that it could not reach a verdict of guilt unless appellant intentionally murdered the victim or intentionally assisted in the commission of

the murder and the aggravating offense.[5] See *Cantu v. State*, 939 S.W.2d 627, 645 (Tex.Crim.App.), *cert. denied*, 118 S.Ct. 557 (1997); *McFarland v. State* 928 S.W.2d at 517. This finding of guilt was a testament to the jury's belief that appellant possessed the appropriate intent, and any Eighth Amendment requirements were thus satisfied. *Webb v. State*, 760 S.W.2d 263, 268 (Tex.Crim.App. 1988), *cert. denied*, 109 S.Ct. 3202 (1989). See *Lawton v. State*, 913 S.W.2d at 555.

Appellant, in the same argument, claims the § (2)(b)(2) statute is "contrary to state law," and says in his brief that Texas Penal Code § 7.02(a)(2), under which the jury was charged, "does not mention anticipation or foreseeing that a crime would be committed as creating criminal liability under the law of parties." Appellant is mistaken because the law of parties was not applicable at the punishment phase of trial. *Webb v. State*, 760 S.W.2d at 268; *Green v. State*, 682 S.W.2d 271 (Tex.Crim.App. 1984), *cert. denied*, 105 S.Ct. 1407 (1985). During the guilt/innocence stage of trial, the jury was properly instructed that appellant could be found criminally responsible as either the primary actor or as a party who intended to promote or assist in the commission of the offense. Tex. Penal Code 7.02(a)(2). The § (2)(b)(2) special issue was included during punishment to ensure that the jury consider only appellant's culpability and not the culpability of his cohorts. *McFarland v. State*, 928 S.W.2d at 517; *Martinez v. State*, 899 S.W.2d 655 (Tex.Crim.App. 1994), *cert. denied*, 116 S.Ct. 378 (1995). No contradictions exist between the two provisions as

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[5] See Tex. Penal Code §§ 7.01(a) & 7.02(a)(2).

they are applicable at different points during trial. Point of error number three is overruled.

Appellant, in his fourth point of error, argues the trial court erred in denying a pre-trial motion to hold Article 37.071 §§ 2(e) & (f) unconstitutional under the Fourteenth Amendment's Due Process Clause and Article I, § 10 of the Texas Constitution. Appellant argues that Article 37.071 § 2(e), the mitigation issue, impermissibly shifts the burden of proof to the defendant. This assertion has been addressed on numerous occasions in the past and has been held to be without merit. We refer appellant to those decisions for a more complete analysis of the issue. See *Cantu v. State*, 939 S.W.2d at 641; *Matchett v. State*, 941 S.W.2d 922, 935 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 2487 (1997); *Barnes v. State*, 876 S.W.2d at 330. Turning to appellant's concern regarding the constitutionality of Article 37.071 § 2(f), no argument or authority is provided explaining why a review by this Court is warranted. We dismiss this issue as inadequately briefed. See Tex. R. App. Pro. 38.1(h). The fourth point of error is overruled.

In his fifth and sixth points of error, appellant argues the present statutory system is contradictory to the Eighth Amendment because it fails to require that a jury consider all mitigating evidence, and the definition of mitigating evidence provided in Article 37.071 § 2(f)(4) is unconstitutionally narrow. It was argued at trial, and it is argued now, that the definition of mitigating evidence "impermissibly limits the Eighth Amendment concept of mitigation to factors that render a capital defendant less 'morally blameworthy' for commission of capital

murder." This Court has consistently held there are no limits upon what evidence a juror can consider when determining whether a sentence less than death is appropriate. *Shannon v. State*, 942 S.W.2d 591, 597 (Tex.Crim.App. 1996). And Article 37.071 § 2(f)(4) "does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness as appellant alleges." *Ibid.* See also *King v. State*, 953 S.W.2d 266, 274 (Tex.Crim.App. 1997). Points of error five and six are overruled.

Appellant questions the constitutionality of the "10-12 Rule" in Article 37.071 § 2(f)(2) in his tenth point of error. He claims this portion of the Texas Code of Criminal Procedure runs afoul of Eighth Amendment concerns. This identical argument has been addressed and dismissed on numerous prior occasions. *Cantu v. State* 939 S.W.2d at 645; *McFarland v. State*, 928 S.W.2d at 519. Point of error ten is overruled.

Within point of error number twelve, appellant claims Article 37.071 § 2(a),[6] is violative of the Eighth and Fourteenth Amendments because it prevents the jury from knowing that, pursuant to Article 37.071 § 2(g),[7] a single holdout juror can force

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[6] Article 37.071§ 2(a) reads in relevant part:

> . . . The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

[7] Article 37.071§ 2(g) reads in relevant part:

> . . . If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an

the imposition of a life sentence upon the defendant. Appellant directs us to the decisions of other state jurisdictions as support. It is well-settled in this state, however, that the command of Article 37.071 § 2(a), does not contradict Article 37.071 § 2(g), and does not run contrary to either the Eighth or Fourteenth Amendments. Members of a jury shall not be instructed on the effects of their individual answers to the special punishment issues of Article 37.071. See *Pondexter v. State*, 942 S.W.2d 577, 586 (Tex.Crim.App. 1996), *cert. denied*, 118 S.Ct. 85 (1997); *Emery v. State*, 881 S.W.2d 702, 711 (Tex.Crim.App. 1994), *cert. denied*, 115 S.Ct. 1257 (1995); *Draughon v. State*, 831 S.W.2d 331, 337 (Tex.Crim.App. 1992), *cert. denied*, 113 S.Ct. 3045 (1993); *Nobles v. State*, 843 S.W.2d 503, 508-10 (Tex.Crim.App. 1992). Point of error twelve is overruled.

The second point of error deals with the trial court's admission of two autopsy photographs, each one of which appellant considers cumulative of others already admitted into evidence. Appellant claims Exhibit 113B, a shot of the victim's face and upper shoulders showing extensive trauma, blood, and duct tape around the eyes and neck, was duplicative of a previous photograph that showed the clothed decedent from the thighs up to the head with an identification placard across her waist. Appellant

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affirmative finding on an issue submitted under Subsection (c) of this article or is unable to answer any issue submitted under Subsection (b) or (e) in this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

also argues Exhibit 113J, a picture of decedent's bruised left bicep and inner elbow, along with an identification placard, was duplicative of a prior photograph that showed the unclothed upper body of the decedent with her left arm extending off the autopsy table. The identification placard rested on her chest and arm. Both photographs were objected to as needlessly cumulative and unfairly prejudicial under Rule 403 of the Texas Rules of Criminal Evidence.

The admission in evidence of photographs is within the sound discretion of the trial court judge, who determines whether they serve a proper purpose in the enlightenment of the jury. *Long v. State*, 823 S.W.2d 259, 270 (Tex.Crim.App. 1991), *cert. denied*, 112 S.Ct. 3042 (1992). The judge's action will not be disturbed in the absence of a showing of an abuse of discretion. *Terry v. State*, 491 S.W.2d 161, 163 (Tex.Crim.App. 1973); *Martin v. State*, 475 S.W.2d 265, 267 (Tex.Crim.App.), *cert. denied*, 93 S.Ct. 469 (1972). If a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible. *Id.*, at 267. The two photographs in question cannot be considered irrelevant to the case, and they are not so shocking or gruesome that "a juror of normal sensitivity would necessarily encounter difficulty rationally deciding the critical issues of this case after viewing them." *Narvaiz v. State*, 840 S.W.2d at 429. See also *Fuller v. State*, 829 S.W.2d 191, 206 (Tex.Crim.App. 1992), *cert denied*, 113 S.Ct. 2418 (1993). Both photographs offered the jurors an opportunity to view the bruising and other trauma inflicted upon the decedent and reinforced testimony that had already been presented at trial. Appellant's alternative

argument that the photographs were cumulative must fail as well. Texas Rule of Criminal Evidence 403 provides, in part, that relevant evidence may be excluded if its probative value is *substantially* outweighed by the countervailing consideration of the *needless* presentation of cumulative evidence. The photographic evidence was unavoidably cumulative to a certain degree, but appellant has shown us no basis for concluding that a reasonable trial judge would necessarily find that the probative value of the photographs was substantially outweighed by its detrimental effect on the efficiency of the trial process. *Alvarado v. State*, 912 S.W.2d 199, 213 (Tex.Crim.App. 1995) (plurality opinion). We discern no abuse of discretion. The second point of error is overruled.

The eleventh point of error brought to this Court claims the district court erred in permitting the decedent's son to testify at punishment regarding "victim impact" testimony. Our review of the record, however, reveals appellant made no objection to the evidence, and, "in order for an issue to be preserved on appeal, there must be a timely objection which specifically states the legal basis for the objection." *Rezac v. State*, 782 S.W.2d 869, 870 (Tex.Crim.App. 1990). See Tex. R. Crim. Evid. 103(a)(1); Tex. R. App. Pro. 33.1. Point of error number eleven was not preserved for appeal and is consequently overruled.[8]

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[8] With regard to the issue presented, we indicate to appellant that this Court has previously upheld the admissibility of this type of victim-impact testimony. See *Mosley v. State*, No. 72,281, __ S.W.2d __ (Tex.Crim.App. July 1, 1998), slip op. at 83; *Smith v. State*, 919 S.W.2d 96 (Tex.Crim.App. 1996).

In the ninth and final point of error, appellant argues, as he did in a pre-trial motion, and during the punishment phase of trial, that he was entitled to take the stand for the limited purpose of testifying that he was the person named in a foreign document[9] and cross-examination must have been limited to only that subject. In sum, appellant asks this court for a modification of the established rule regarding Texas' policy allowing wide-open cross-examination of witnesses. See Tex. R. Crim. Evid. 611(b). Appellant argues a defendant should be permitted to testify "in [collateral] mitigation matters relating to possible death sentences" and be subject to cross-examination only on those matters brought out on direct examination. To follow appellant's suggestion would contradict almost a century and a half of Texas case law on the matter. See *Wentworth v. Crawford*, 11 Tex. 127, 132 (1853). An accused may not take the witness stand for a limited purpose. *Myre v. State*, 545 S.W.2d 820, 825 (Tex.Crim.App. 1977) (overruled on other grounds); *Brumfield v. State*, 445 S.W.2d 732, 735 (Tex.Crim.App. 1969); *Tyler v. State*, 293 S.W.2d 775 (Tex.Crim.App. 1956) (defendant could not testify for limited purpose of showing who had possession of, and resided in, apartment where heroin was located); *Holder v. State*, 143 S.W.2d 613 (Tex.Crim.App. 1940) (defendant who took stand for limited purpose of proving up his application for a

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[9] The document was in Spanish and listed the name Denys Humberto Zelaya Corea. Appellant stated at trial, and in his brief, that he was the only individual who could testify he was, in fact, that individual named in the document, and it would demonstrate he had no criminal record in the jurisdiction listed.

suspended sentence was subject to cross-examination about the crime charged). If a defendant chooses to testify, he is subject to the same rules governing examination and cross-examination as any other witness, whether he testifies at the guilt-innocence stage or at the punishment stage of the trial. *Felder v. State*, 848 S.W.2d 85, 99 (Tex.Crim.App. 1992), *cert. denied*, 114 S.Ct. 95 (1993); *Cantu v. State*, 738 S.W.2d 249, 255 (Tex.Crim.App.), *cert. denied*, 108 S.Ct. 203 (1987). See Tex. R. Crim. Evid 611(b). We will not endorse the exception appellant seeks. The trial court properly forbade appellant from taking the stand subject only to limited cross-examination. Point of error number nine is overruled.

Finding no reversible error in this case, we affirm the judgment of the trial court.

MANSFIELD, J.

DELIVERED: NOVEMBER 4, 1998

DO NOT PUBLISH

APPENDIX S

BEHAVIORAL MEDICINE CONSULTANTS

CLINICAL PSYCHOLOGY * NEUROPSYCHOLOGY *
REHABILITATION OCCUPATIONAL PSYCHOLOGY *
HEALTH PSYCHOLOGY

Francisco I. Perez, Ph.D.,
ABPP/ABCN
Diplomate In Clinical
Neuropsychology
American Board of Professional
Psychology

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May 28, 2003

J. Gary Hart
2906 Skylark Drive
Austin, Texas 78757
FAX: 512/206-3119

RE: **Carlos Ayestas (aka Dennis Zelaya)**

Dear Mr. Hart:

At your request, I traveled to the Polunsky Unit in Livingston, Texas, on 5/23 to conduct an intellectual assessment of your client, Carlos Ayestas. Specifically, you wanted me to assess his intellectual status. Your client was cooperative during the testing.

On the Wechsler Adult Intelligence Scale-Spanish version, he obtained a Full IQ of 115 which places him in the high average range. On the Test of Nonverbal Intelligence, he obtained a score of 99. His performance is within the average to high average range.

There is no evidence for mental retardation. However, I have some concerns regarding Mr. Ayestas' psychological pattern. During my clinical interview, it became apparent that Mr. Ayestas is developing some delusional thinking that clearly needs to be monitored. He told me that he has been placed on antipsychotic medication recently and clearly his mental status needs to be evaluated closely.

Thank you once again for the opportunity to work with your client.

If you have any questions, please don't hesitate to contact me.

Best regards,

/s/ Francisco I. Perez, Ph.D.

Francisco I. Perez, Ph.D.

APPENDIX T

UTMB MANAGED CARE
MENTAL HEALTH SERVICES

Outpatient Psychiatric Follow-up

Patient Name: AYESTAS, CARLOS M
TDCJ# 999240 Date: 02/10/2004 15:00

Facility: POLUNSKY (formerly TERRELL)

Medications:
ENZTROPINE MESYLATE 1MG TABS,
1 TABS ORAL(po) QPM

Special Instructions: EQUI=COGENTIN. *NON-KOP*, VERY IMPORTANT TO TAKE OR USE THIS EXACTLY AS DIRECTED

TRIFLUOPERAZINE HCL 5MG TABS,
1 TABS ORAL(po) QPM

Special Instructions: EQUI=STELAZINE. **NON-KOP**, MAY CAUSE DROWSINESS OR DIZZINESS, MAY IMPAIR THE ABILITY TO DRIVE OR OPERATE MACHINERY, VERY IMPORTANT TO TAKE OR USE THIS EXACTLY AS DIRECTED

Allergies:
Most recent vitals from 01/13/2003: BP: 146/80 (Sitting) Wt. 171 Lbs. Height Pulse: 57 (Sitting) Resp.: 20/min Temp: 97.8 (Oral)

CASE SUMMARY

Problems:
DENTAL EXAMINATION [V72.2] first observed 02/18/2003 (Active)
GINGIVAL/PERIODONTAL [523] first observed

02/03/2004 (Active)
SCHIZOPHRENIA, UNDIFFERENTIATED TYPE [295.90] first observed 10/29/2003 (Active)
TB CLASS 0 (NO EXPOSURE PULM. TUBERCULOSIS) [011.] first observed 10/10/2003 (Active)
VARICELLA WITHOUT MENTION OF COMPLICATION [052.9] first observed 10/08/2003 (Active)
ANNUAL PPD SKIN TEST [V74.4] first observed 10/08/2003 ()

S: The patient reports: "alright." he is doing well. Currently asymptomatic. Good appetite/sleep

Medication effects: good response
Medication side effects: none
Medication compliance:100%
Laboratory results:
Psychotherapy participation:

O: Mental Status: A+0 x 3 , appearance - wnl, behavior - wnl, speech - wnl, thought content — no a/v hallucinations or delusions, no SI, mood and affect - normal range

A: Axis I: SCHIZOPHRENIA, UNDIFFERENTIATED TYPE [295.90]
Axis II: defer
Axis III: none

P: Medications: Renew current Rx plan

1. d/c Stelazine and Cogentin
2. Start Stelazine 5mg 1 tab po qpm x30d, 5 rf
   Cogentin lmg 1 tab po qpm x30d, 5 rf

Psychotherapy:

Laboratory: LFT TSH chem-10 lipids HgbA1C

Procedures Ordered:
CARDIAC RISK PANELS (LIPIDS) *:
schizophrenia, undifferentiated type
CHEM 10: schizophrenia, undifferentiated type
HGB A1C*: schizophrenia, undifferentiated type
LIVER (LFS) PANEL *: schizophrenia,
undifferentiated type
THYROID STIMULATING HORMONE *:
schizophrenia, undifferentiated type

Referrals:
Follow-up: 3 mos

The risks, benefits, side effects, and alternatives to ___ Stelazine and Cogentin _____ have been discussed and the patient agrees.

* * *

Outpatient Psychiatric Follow-up

Patient Name: AYESTAS, CARLOS M
TDCJ#: 999240Date: 02/10/2004 15:00

Facility: POLUNSKY (formerly TERRELL)

Interpreter Used Yes No Name of interpreter:

Electronically Signed by FONG, GEORGE G P.A-C on 02/10/2004.
##And No Others##

* * *

CORRECTIONAL MANAGED CARE
CLINIC NOTES - MID LEVEL PROVIDER

Patient Name: AYESTAS, CARLOS M
TDCJ#: 999240 **Date**: 06/16/2006 07:12
Facility: POLUNSKY (formerly TERRELL)

AGE: 36 Years RACE: H SEX: Male

CASE SUMMARY

Problems:

Cars:

Mental Health Cars 2 First Observed 11/14/2005 03:49PM
Dental Cars 0 First Observed 03/06/2006 03:23PM

Cid:

Annual Ppd Skin Test First Observed 09/28/2005 07:27PM

Dental:

Hard Tissue Disease First Observed 03/09/2004 09:46AM
Dental Examination First Observed 05/18/2005 07:27AM
Gingival/periodontal First Observed 10/14/2005 09:14AM

Mental Health:

Schizophrenia, Undifferentiated Type First Observed 04/20/2004 12:37PM

Mh Other:

Mental Status Exam First Observed 02/01/2005 04:54PM
Mental Status Exam First Observed 02/01/2005 04:54PM
Mental Health Behavioral Observations First Observed 07/21/2005 03:49PM

Not Specified:

Tb Class 0 (no Exposure Pulm. Tuberculosis) First Observed 10/10/2003

08:47AM
Observation- Cond Not Found First Observed 07/30/2004 09:32AM
Brief Psychiatric Rating Scale First Observed 03/04/2005 10:00AM
Observation For Unspecified Suspected Condition First Observed 07/15/2005 08:51AM
Arthritis First Observed 11/07/2005 12:19PM
Mental Health Case Mgmt Problems And Trmt Objectives First Observed 12/28/2005 10:21AM
Medical Cars 2 First Observed 03/31/2006 11:30AM

Medications:
BENZTROPINE MESYLATE I MG TABS, 1 TABS ORAL(po) QPM

Special Instructions: EQUI=COGENTIN, *NON-KOP*, VERY IMPORTANT TO TAKE OR USE THIS EXACTLY AS DIRECTED

TRIFLUOPERAZINE HCL 2MG TABS, 1 TABS ORAL(po) QPM

Special Instructions: EQUI=STELAZINE. **NON-KOP**, MAY CAUSE DROWSINESS OR DIZZINESS, MAY IMPAIR THE ABILITY TO DRIVE OR OPERATE MACHINERY, VERY IMPORTANT TO TAKE OR USE THIS EXACTLY AS DIRECTED

Allergies: NO KNOWN ALLERGIES

Current Lab Tests:
Most recent vitals from 06/16/2006: BP: 144/84 (Sitting) Wt. 174 Lbs. Height 64 In. Pulse: 57 (Sitting) Resp.: 16/min Temp: 97.9 (Oral)

Patient Language: ENGLISH
Name of interpreter, if required:

Chief Complaint:
scr for constipated, wants results of blood tests
o- abd soft ,normoactive bs, nt

AUTOMATED CHEMISTRY	**05/17/2006 11:59**
BILIRUBIN TOTAL	0.4
CHEMISTRY	05/17/2006 11:59
ANION GAP	8
BUN	8

APPENDIX U

Cause No. 754409

EX PARTE	§	IN THE 230TH DISTRICT COURT
CARLOS MANUEL AYESTAS, Applicant	§	OF HARRIS COUNTY, TEXAS

AFFIDAVIT

STATE OF TEXAS	§	DATE: January 26, 2005
HARRIS COUNTY	§	

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Diana Olvera, who being by me duly sworn, upon his oath deposes and says:

"My name is Diana Olvera. I am presently licensed to practice law in the State of Texas and have been licensed since November, 1987. My Texas bar number is 15278650. I have been practicing since that time, and at least 75 percent of my practice has been criminal. I have been appointed on several capital cases that were either reduced or tried as non-death cases. I have tried five capital cases that were death cases. Judge Keegans appointed me to represent the defendant, Carlos Manuel Ayestas, in his 1997 capital murder trial in cause no. 754409 in the 230th District Court of Harris County, along with defense counsel Connie Williams.

As part of the pre-trial investigation and preparation, the defense prepared and filed pre-trial

motions, interviewed witnesses, talked to the defendant's family, obtained discovery from the State, reviewed the State's file, employed the services of an investigator, John Castillo, talked with the defendant numerous times about the offense and pending trial, and reviewed juror questionnaires. We also talked to the defendant about his background and life. Because I am fluent in the Spanish language, I was able to easily communicate with Mr. Ayestas.

Presiding Judge Bob Burdette conducted an extensive voir dire of the prospective jurors regarding imposition of the death penalty. Judge Burdette then asked each juror that indicated an unwillingness to impose the death penalty individually if they could consider the death penalty. Each juror answered that under no circumstance would they impose the death penalty as punishment. We did not object to these jurors being struck because we believed that the Judge had established their inability to follow the law. Also, we did not object as a form of trial strategy. Jurors who would always give the death penalty regardless of the circumstances of the offense were also excused by agreement with the State.

I do not recall Carlos wanting to testify at trial or insisting on testifying at trial. Co-counsel and I discussed whether or not Carlos should testify, and we made the strategic decision that it would not be a good idea for Carlos to testify. We considered the amount of physical evidence that would be introduced at trial, the language problem, the intelligence level of Carlos and how Carlos would perform under cross-examination by the prosecutor,

Bill Hawkins. Other considerations included opening the door to the Defendant's extraneous offenses. Additionally, I do not recall Carlos ever stating that he only saw the victim after she was already bound by tape and all he did was to pull the tape down from around her mouth.

We requested and received over the objection of the prosecutor, Bill Hawkins, a charge on felony murder. Both Connie Williams and myself argued for felony murder during guilt-innocence closing argument, and we presented the evidence we had to support felony murder such as the cross-examination of Dr. Murr as to whether or not an individual would vomit after death.

I had numerous conversations with the Defendant regarding his family and their presence at trial. The Defendant continuously stated that he did not want his family contacted due to problems he and his family had in his home country. To the best of my recollection, the Defendant did not acquiesce to having his family contacted until after jury selection was completed. At that time, I made every effort to contact his family. On May 29, 1997, my investigator, John Castillo, sent a letter to the Defendant's family. On June 10, 1997, I sent a letter to the family at an address provided by the Defendant. Once we made contact with the family, I informed them about the trial date and requested their presence, and I, or a representative from my office, communicated with them on many occasions by telephone. Only July 2, 1997, I faxed a letter to the American Embassy in Honduras to expedite the family's travel to the United States. In this letter, I informed the American Embassy the need for the

Defendant's family's presence at his trial for the instant offense. I also set up a meeting at the embassy for the Defendant's family on July 3, 1997 at 8:00 a.m. I included a copy of the June 10, 1997 letter as well.

I also communicated to the family via telephone the requirements for travel to the United States. Per my telephone conversation with the Defendant's sister, Somara Zalaya, on June 25, 1997, she indicated that there were additional reasons the family would have difficulty leaving Honduras for the Defendant's trial, including their father's illness and economic reasons. In my conversation with the Defendant's mother, Zoila Zalaya, on June 26, 1997, she did not appear concerned for the Defendant and was evasive in her responses. Per my notes, she stated the Defendant knew what he was doing, and she would call me back and let me know what they could do.

I did not object to the victim impact testimony of Elim Paneque for several reasons. In preparation for trial, we filed a motion to voir dire on victim impact testimony, a motion in limine regarding the complainant's character, and a motion for discovery of the victim impact testimony. The State provided discovery of the victim impact testimony before trial, and the testimony of the victim was in compliance with the information provided to us by the State. The victim impact testimony was legally admissible. We also made the strategic decision not to object and interrupt the victim while he testified.

I did not request an instruction requiring the jury to only consider the Defendant's extraneous offenses against him only if they first found he committed

them beyond a reasonable doubt. The Jury was properly instructed during trial to only consider it for purposes of determining the Defendant's guilty knowledge. Furthermore, the jury was given the appropriate instruction in the charge to only consider the extraneous conduct in determining the guilty knowledge of the Defendant, if any, and to not consider it for any other purpose.

I did not object when the prosecutor refreshed Henry Nuila's memory, because the Witness stated he couldn't be specific about a particular statement he made. At that point, the prosecutor properly refreshed the witness' memory with his statement. The witness stated his memory was refreshed after reviewing the statement. The prosecutor properly refreshed the witness' memory, and there was no need for me to object.

During closing argument, the prosecutor argued that he would not have asked the assistant medical examiner to change her opinion regarding the victim's manner of death. The prosecutor was responding to an inference made during closing argument of defense counsel that was appropriate and did not require an objection. During jury argument, as well as throughout trial, we made the objections we thought were appropriate and beneficial to the Defendant.

The Honduran Consulate was made aware of Carlos' situation as I, myself, informed them in person of his arrest, indictment and upcoming trial for capital murder. Carlos knew of my contact with the Consulate, and he did nothing to assist me in my efforts to contact his family. Carlos did not want them contacted by the Consulate or me.

I have read the above statement and find it to be true and correct to the best of my knowledge."

/s/ Diana Olvera
DIANA OLVERA
Affiant

SWORN AND SUBSCRIBED before me, under oath, on this the 26th day of January, 2005.

/s/ Alicia Trevino
NOTARY PUBLIC in and for the State of Texas

My commission expires:
2-12-05

APPENDIX V

[HANDWRITTEN] AFFIDAVIT OF DENNIS HUMBERTO ZELAYA, A/KA CARLOS MANUEL AYESTAS

STATE OF TEXAS x
x
COUNTY OF POLK x

My name is Dennis Humberto Zelaya. I am above the age of eighteen and am competent in all respects to make this affidavit.

I was born in in Tegucigalpa, Honduras, and am a Honduran national. I was convicted of capital murder in the 230th District Court of Harris County, Texas, under the name Carlos Manuel Ayestas, in cause number 754409 in July of 1997.

I have read the affidavit that was executed by my trial counsel, Diana Olvera, which she signed on January 26, 2005. Many statements that Ms. Olvera has made in her affidavit are inaccurate. For example, she states that she had "numerous" conversations with me prior to my trial regarding my family and their presence at trial. This is not true. Ms. Olvera only talked to me on one occasion . . .

[remaining text of sentence not available]

* * *

testify on my behalf. This conversation took place in the courtroom on an occasion shortly before trial began. Ms. Olvera asked me to give her an address and phone number for my family in Honduras. I gave her an address and two phone numbers. The address I gave her was my sister's business address.

I did not tell Ms. Olvera, on this occasion or on any other occasion, that I did not want her to contact my family. It is not true that I "continuously" stated that I did not want my family contacted. In fact, I never told her that I did not want my family contacted. When Ms. Olvera asked me for information to contact my family, I willingly gave it to her. I had no objection to her contacting my family.

In addition, Ms. Olvera states in her affidavit that I was aware that she had contacted the Honduran Consolate [sic] on my behalf. I do not know whether that is true or not, but if she did, she never informed me of it. I never told Ms. Olvera or the Honduran Consulate that I did not want them to contact my family. In fact, I . . .

[remaining text of sentence not available]

* * *

duran Consulate, or how they could have helped me during the course of my capital murder trial, until the Consulate finally contacted me for the first time several days after I was convicted, in July of 1997. Before that I never knew that I could have tried to get help from the Honduran Consulate under the Vienna Convention on Consular Relations. Had I known about the Honduran Consulate, I could have called them myself from the county jail.

Ms. Olvera only came to see me once in the county jail. At one of the pre-trial hearings I had asked her how much it would cost to hire her as my private attorney, instead of having her represent me under appointment by the court. On that one occasion when Ms. Olvera came to see me at the county jail, we did not talk about my case. We only talked about

how much it would cost for me to retain her. The only time Ms. Olvera talked to me about my case, it always happened either in the courtroom or in the holding cell right next door to the courtroom.

On the one occasion when Ms. Olvera talked to me about getting my family to come testify on my behalf, she did not explain to me why she wanted to them to testify, or how their testimony could help in my case. She just asked me to give her information to contact them, which I gave her. In fact, my family already knew that I was in the county jail, because I had made as many as six collect calls to them from the county jail to Honduras. During those phone calls I told my family that I was in jail. I did not tell them I was facing the death penalty, however, because I myself did not really believe that I would be sentenced to death. Had Ms. Olvera fully explained to me the seriousness of my situation, and how my family could have contributed at the punishment phase of my trial, I would have been eager for her to contact them and help them make arrangements to get to my trial in time.

/s/ Dennis Humberto Zelaya
Dennis Humberto Zelaya a/k/a
Carlos Manuel Ayestas

Executed on this 10th day of February, 2005

/s/ Stacy Edwards
Notary Public, State of Texas

APPENDIX W

FILED
CHARLES BACARISSE
District Clerk
NOV 06 2006
Time:_____
Harris County, Texas
By: /s/_____
Deputy

Cause No. 754409-A

EX PARTE	§	IN THE 230TH DISTRICT COURT
CARLOS MANUEL AYESTAS,	§	OF HARRIS COUNTY,
Applicant	§	TEXAS

AFFIDAVIT

STATE OF TEXAS	§	DATE: October 24, 2006
HARRIS COUNTY	§	

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Diana Olvera, who being by me duly sworn, upon his oath deposes and says:

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Diana Olvera, who being by me duly sworn, upon his oath deposes and says:

"My name is Diana Olvera. I am presently licensed to practice law in the State of Texas and have been licensed since November, 1987. My Texas bar number is 15278650. I have been practicing since that time, and at least 75 percent of my practice has been criminal. I have been appointed

on several capital cases that were either reduced or tried as non-death cases. I have tried five capital cases that were death cases. Judge Joe Keegans appointed me to represent the defendant, Carlos Manuel Ayestas, in his 1997 capital murder trial in cause no. 754409 in the 230th District Court of Harris County, along with defense counsel Connie Williams.

As part of the pre-trial investigation and preparation, the defense prepared and filed pre-trial motions, interviewed witnesses, talked to the defendant's family, obtained discovery from the State, reviewed the State's file, employed the services of an investigator, John Castillo, talked with the defendant numerous times about the offense and pending trial, and reviewed juror questionnaires. We also talked to the defendant about his background and life. Because I am fluent in the Spanish language, I was able to easily communicate with Mr. Ayestas.

I had numerous conversations with the defendant regarding his family and their presence at trial, and I pleaded with Carlos to allow me to contact his family. The defendant continuously stated that he did not want his family contacted due to problems he and his family had in his home country. To the best of my recollection, the defendant did not acquiesce to having his family contacted until right before jury selection began.

Once the defendant agreed to have his family contacted, I made every effort to contact his family. On May 29, 1997, my investigator, John Castillo, sent a letter to the defendant's family (Letter dated May 29, 1997, attached hereto as Exhibit A). On

June 10, 1997, I sent a letter to the family at an address provided by the defendant, which states that the defendant finally agreed to have them contacted (Letter dated June 10, 1997, attached hereto as Exhibit B). On July 2, 1997, I faxed a letter, which I also sent to the defendant's family, to the American Embassy in Honduras to expedite the family's travel to the United States (Letter dated July 2, 1997, to family attached hereto as Exhibit C; see also fax transmission record of fax to American Embassy attached hereto as Exhibit D). In this letter, I informed the American Embassy the need for the defendant's family's presence at his trial for the instant offense. I also set up a meeting at the embassy for the defendant's family on July 3, 1997 at 8:00 a.m. I included a copy of the June 10, 1997 letter as well.

Additionally, I communicated to the family via telephone the requirements for travel to the United States. Once we made contact with the family, I informed them about the trial date and requested their presence, and I, or a representative from my office, communicated with them on many occasions by telephone. I first contacted the family by telephone on June 3, 1997, at a number provided by the defendant (see phone record of June 3, 1997 call attached hereto as Exhibit E). I believe I spoke with Carlos' mother, and although the call was brief, I identified myself, explained Carlos' situation, and requested their presence at the defendant's trial. Carlos' mother stated they would call me back, and I encouraged them to do so as soon as possible.

On June 25, 1997, I received a call from the defendant's family. Per my telephone conversation

with the defendant's sister, Somara Zalaya, she indicated that there were reasons the family would have difficulty leaving Honduras for the defendant's trial, including their father's illness and economic reasons. Zalaya also informed me that their father had killed their neighbor, another reason the family would have difficulty leaving Honduras for the defendant's trial (Record of June 25, 1997, phone call attached hereto as Exhibit F).

I also called the defendant's family on June 26, 27, and July 2. In my conversation with the defendant's mother, Zoila Zalaya, on June 26, 1997, she did not appear concerned for the defendant and was evasive in her responses. Per my notes, she stated the defendant "knew what he was doing," and she would call me back and let me know what they could do (Record of June 26, 1997, phone call attached hereto as Exhibit G). My assistants also noted that the defendant's mother exhibited an apparent lack of concern for her son's situation (Records of June 26, 1997, telephone call attached hereto as Exhibits H & I).

The Honduran Consulate was made aware of Carlos' situation as I, myself, informed them in person of his arrest, indictment and upcoming trial for capital murder. I went to the Honduran Consulate on Monday, June 9, 1997 (Calendar excerpt noting visit to Honduran Consulate attached hereto as Exhibit J; See also business card received from Honduran Consulate attached hereto as Exhibit K). Although I do not recall the name of the individual with whom I spoke, I know I did not speak with the Consul General. However, I made sure the consulate staff was aware of Carlos'

situation. Based on my conversation with the Honduran Consulate employee and my experience in dealing with another foreign consulate, I determined the Honduran Consulate would not be able to provide assistance in securing Carlos' family members' presence at his trial. Thereafter, I learned of and contacted the American Embassy in Honduras to ask for assistance in bringing Carlos' family members to Houston. Carlos knew of my contact with the Consulate. He did nothing to assist me in my efforts to contact his family and did not want them contacted by the Consulate or me.

I have read the above statement and find it to be true and correct to the best of my knowledge."

/s/ Diana Olvera
DIANA OLVERA
Affiant

SWORN AND SUBSCRIBED before me, under oath, on this the 24th day of October, 2006.

/s/ Teresa Ann Lopez
Notary Public in and for
the State of Texas

My commission expires:
12-15-08

APPENDIX X

CAUSE NUMBER 754409-A

EX PARTE	**IN THE 230TH DISTRICT COURT**
CARLOS MANUEL AYESTAS, APPLICANT	**OF HARRIS COUNTY, TEXAS**

RESPONDENT'S PROPOSED FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's Original Answer, the evidence elicited at the applicant's capital murder trial in cause no. 754409, the evidence elicited during all habeas proceedings, the affidavits of trial counsel, and official court documents and records, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Carlos Manuel Ayestas, the applicant, was indicted and convicted of the offense of capital murder in cause number 754409 in the 230th District Court of Harris County, Texas.

2. The applicant was represented at trial by counsel Diana Olvera and Connie Williams.

3. On July 10, 1997, after the jury answered affirmatively the first and second special issues and negatively answered the third special issue, the trial court sentenced the applicant to death (XXI S.F. at 242).

4. On November 4, 1998, the Court of Criminal Appeals affirmed the conviction in an unpublished

opinion. *Ayestas v. State*, No. 72,928 (Tex. Crim. App. Nov. 4, 1998)(not designated for publication).

GUILT-INNOCENCE EVIDENCE

5. The Court finds, based on the evidence presented during the applicant's trial, that the applicant and Frederico Zaldivar looked at a car for sale by Ana McDougal in August, 1995; that McDougal went inside her house at one point and came outside to find the applicant and Zaldivar coming out of the neighboring home of Santiaga Paneque, the complainant; and, that the men told McDougal that they were looking at furniture the complainant was selling (XX S.F. at 119-131, 154).

6. The Court finds, based on the evidence presented during the applicant's trial, that Elin Paneque arrived home on September 5, 1995, to find the house unlocked, the television missing, the kitchen drawers open, some dishes missing, the complainant's bedroom ransacked, and the complainant's body lying on the bathroom floor (XX S.F. at 80-99).

7. The Court finds, based on the evidence presented during the applicant's trial, that the complainant was bound with tape around her wrist, eyes, neck, and ankles and an alarm clock cord was tied to her wrist; that a partial shoe print was on the bathroom floor; and, that a pair of eyeglasses was by the complainant's feet and a small box containing cufflinks was inside the bathroom (XX S.F. at 91, 110-2, 154).

8. The Court finds, based on the evidence presented during the applicant's trial, that Michael D. Holtke, Harris County Sheriff's Department, later

determined that the pieces of tape removed from the complainant's body came from a roll of duct tape recovered from the bathroom counter and that the piece of tape around the complainant's neck was the first piece torn from the roll of tape (XX S.F. at 213-216, 237).

9. The Court finds, based on the evidence presented during the applicant's trial, that the applicant's prints were found on the roll of duct tape and also on the piece of tape from the complainant's ankles (XX S.F. at 233); that fingerprints of the applicant's co-defendant, Federico Zaldivar, were found on the bathroom door and on the small box containing cufflinks in the bathroom (XIX S.F. at 127, 129-131); and, that fingerprints lifted from the bottom of a planter base matched those of Robert Meza, the applicant's other co-defendant (XIX S.F. at 129-130).

10. The Court finds that, during the applicant's trial, Henry Nuila testified that he met the applicant, who had two other men with him, in Louisiana on September 20TH and 21ST, 1995; that the applicant told Nuila his name was "Dennis" and he had murdered a woman in Houston; that the applicant asked Nuila to kill the two other men because they knew too much; and, that the applicant showed Nuila an Uzi machine gun and threatened to kill Nuila if he would not help (XIX S.F. at 158-74).

STATE'S PUNISHMENT EVIDENCE

11. The Court finds, based on the evidence presented during the applicant's trial, that the applicant gave the following information to Harris County Pre-trial Services when he was arrested for theft in July, 1995: that he was from Mexico, had no

criminal history, spoke English, had graduated from high school, and had no health, alcohol, or drug problems (XXI S.F. at 80-83).

12. The Court finds that the State presented evidence that the applicant was convicted and received probation for possession for sale of cocaine and possession for sale of heroin in California in June, 1990; that the applicant's probation was revoked in 1991 when he was convicted of burglary; that the applicant was sentenced to three years in prison for the drug cases and two years for the burglary conviction; and, that the applicant was convicted of misdemeanor theft and was sentenced to ten days in the Harris County Jail in July, 1995 (XXI S.F. at 93-94).

13. The Court finds, based on the evidence presented during the applicant's trial, that the applicant approached Candelario Martinez in a hotel parking lot, pointed a machine gun at Martinez, and forced him into a room where a man was already holding a knife on Martinez's friend, Jose, and another man put a knife to Martinez's back; that the applicant took Martinez's money before putting Martinez and Jose in the bathroom; that Martinez heard the men arguing about who would kill him and Jose; and, that the applicant threatened to kill Martinez and his family if he called the police (XXI S.F. at 101-6).

14. The Court finds, during the applicant's trial, Evan Holtsclaw, Kenner, Louisiana Police Department, testified that he spoke to Henry Nuila on September 21, 1995; that Holtsclaw went to Nuila's sister's house afterwards and arrested the applicant and two other men (XXI S.F. at 155); and,

that a machine gun was found underneath the applicant who was lying on the floor (XXI S.F. at 159, 170).

15. The Court finds that, during the applicant's trial, Elin Paneque, the complainant's son, testified that he was in therapy for six months immediately after the complainant's death and was in therapy at the time of trial; that the complainant's death left a void in Paneque's life that would never be filled; that Paneque took the oath to become a United States citizen two days after the complainant's murder; and, that Paneque regretted that the complainant was not there (XXI S.F. at 185-6).

DEFENSE PUNISHMENT EVIDENCE

16. The Court finds, based on the evidence presented during the applicant's trial, that the applicant offered three letters from an English teacher at the Harris County Jail stating that the applicant was a serious and attentive student (XXI S.F. at 190).

First Ground: alleged ineffective assistance of counsel

17. The Court finds, based on the credible affidavit of trial counsel Diana Olvera, that trial counsel prepared and filed pre-trial motions, interviewed witnesses, talked to the applicant's family, obtained discovery from the State, reviewed the State's file, employed the services of an investigator, John Castillo, talked with the applicant numerous times about the offense and pending trial, reviewed juror questionnaires, spoke to the applicant about his background and life, and attempted to secure the presence of the applicant's family at the

applicant's trial. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

BURDEN OF PROOF - *VOIR DIRE*

18. The Court finds that, during voir dire examination in the applicant's trial, the trial court questioned the following prospective jurors and elicited information that they would not impose the death penalty under any circumstances: Laura Hilborn, Diane Drummond, Myrna Salaun, Brenda Allison, Rose Dominguez, John Wilson, Travis Pickrom, Marjorie Rayson, Maclovio Orozco, Carmen Harris, Lydia Newell, Joyce Green, Sherry Brown, and Nancy Johnson (V S.F. at 30-31)(11 S.F. at 22)(XV S.F. at 41-3).[1]

19. The Court finds that the prospective jurors who maintained that they would never impose the death penalty under any circumstances were challengeable for cause based on their bias or prejudice against a phase of the law upon which the State was entitled to rely for punishment, just as prospective jurors who maintained that they would always give the death penalty regardless of the circumstances were challengeable for cause by the applicant.

20. The Court finds, based on the credible affidavit of trial counsel Diana Olvera, that trial counsel made the reasonable, strategic decision to agree with the State to excuse prospective jurors who maintained that they would always give the death penalty regardless of the circumstances and to

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[1] The volume of the appellate record dated June 20, 1997 is designated as Vol. 11 and the volume dated June 23, 1997 is designated as Vol. XI.

excuse prospective jurors who maintained that they would never give the death penalty regardless of the circumstances. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

21. The Court finds that the agreement to excuse prospective jurors who demonstrated a bias or prejudice against a phase of the law upon which the State was entitled to rely for punishment did not lessen the State's burden to establish that the prospective jurors were challengeable for cause and that the State's burden was met through the responses elicited by the trial court during *voir dire* examination of the noted prospective jurors.

FELONY MURDER - INTENT

22. The Court finds that the applicant's habeas claim of ineffective assistance of trial counsel based on an alleged failure to present evidence to show that the applicant, if guilty, was allegedly only guilty of felony murder is essentially an attack on the sufficiency of the evidence.

23. The Court finds that the applicant's habeas claim of ineffective assistance of trial counsel based on an alleged failure to present evidence to show that the applicant allegedly neither actually caused the complainant's death nor intended or anticipated that the complainant's life would be taken is essentially an attack on the sufficiency of the evidence.

24. The Court finds that the applicant's attacks on the sufficiency of the evidence are not cognizable in the instant writ proceeding or any subsequent state writ proceedings.

25. The Court finds that, during the applicant's trial, Marilyn Murr, Harris County Assistant Medical Examiner, testified that she performed the autopsy on the complainant's body; that the complainant suffered petechiae in the upper and lower eyelids, bruising and swelling around her right eye, bruising of her lips, a laceration on inside her mouth and on her chin, bruises to the front areas outside her groin area, bruises and contusions to her left arm, a large contusion on the back of her head, a bone protruding from her broken right elbow, a fractured hyoid bone, and bleeding to her neck muscles, esophagus, and skull; and, that the complainant was alive at the time she sustained such injuries (XX S.F. at 145, 175, 180-4).

26. The Court finds that Murr testified that she originally concluded that the cause of the complainant's death was asphyxiation due to ligature strangulation; that Murr amended the cause of death to asphyxiation due to strangulation after considering the large amount of bleeding to the complainant's neck, the fracture of the hyoid bone, and the bleeding around the tip of the thyroid cartilage; and, that the amended cause of death did not exclude asphyxiation due to ligature strangulation (XX S.F. at 188-90).

27. The Court finds that Murr testified that the tape found around the complainant's neck was tight enough to cause the complainant's death, and that one or both hands could have been used to strangle the complainant who was alive when she was strangled (XX S.F. at 193).

28. The Court finds trial counsel elicited testimony that vomit was found at the crime scene

and that, in response to trial counsel's questions, Murr acknowledged that a person would not vomit after death (XX S.F. 197).

29. The Court finds, during guilt-innocence argument, trial counsel argued that the complainant was alive when the applicant and his co-defendants left the scene but choked afterwards; that the applicant, if guilty, was only guilty of felony murder; and, that the State failed to show that the applicant had a specific intent to kill the complainant (XX S.F. at 294).

30. The Court finds that Trial court granted trial counsel's request for a jury instruction on the lesser included offense of felony murder (XX S.F. at 257).

31. The Court finds that trial counsel pursued the reasonable strategy that the applicant, if guilty, was only guilty of the lesser included offense of felony murder and that the applicant neither intended to cause the death of the complainant nor intended or anticipated that the complainant's life would be taken.

32. The Court finds unpersuasive and speculative the habeas affidavit of Randall Frost, M.D., asserting that the complainant's autopsy findings are "highly suggestive" of compressive force applied to the neck, as one would find in strangulation and that it is possible to strangle a person without causing death and then causing death by placing a hand or material over the mouth and nostrils, i.e., suffocation. *See applicant's writ exhibit c.*

33. The Court finds that Randall Frost, M.D., admits the speculative nature of his habeas

conclusion, acknowledging that the acceptance of his hypothesis would require compelling investigative evidence that the victim actually exhibits signs of life after a strangulation with subsequent application of a suffocating barrier to the face. *Id.*

34. The Court finds, based on the credible affidavit of trial counsel, that trial counsel does not recall applicant wanting to testify or insisting on testifying at trial; that trial counsel discussed whether the applicant should testify and made the strategic decision that it would not be a good idea for the applicant to testify; and, that counsel made that decision based on the amount of physical evidence that would be introduced at trial, the language problem, the intelligence level of the applicant, his ability to withstand cross-examination, and the fact that the applicant's testimony would have opened the door to his extraneous offenses. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

35. The Court finds that the applicant's self-serving habeas affidavit asserting that he returned to the complainant before leaving her house and pulled down the duct tape covering her mouth is at odds with evidence that the applicant told Henry Nuila that he killed a woman in Houston and at odds with Frost's speculative scenario of strangulation without death followed by suffocation.

ATTENDANCE OF APPLICANT'S FAMILY AT TRIAL

36. The Court finds, based on the credible affidavit of trial counsel, that trial counsel spoke with the applicant numerous times about his family attending the trial; that the applicant repeatedly

told counsel that the did not want his family contacted because of problems he and his family had in their home country of Honduras; that, to the best of counsel's recollection, the applicant did not agree to having his family contacted until after jury selection was completed; and, that trial counsel made every effort to contact the applicant's family once the applicant agreed. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera; State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera.*

37. The Court finds, based on the credible affidavit of trial counsel, that defense investigator John Castillo sent a letter to the applicant's family in Honduras on May 29, 1997; that trial counsel sent another letter to the applicant's family at an address provided by the applicant on June 10, 1997; that counsel's letter states that the applicant finally agreed for his family to be contacted; that counsel sent another letter to the applicant's family on July 2, 1997 and faxed a letter to the American Embassy in Honduras to expedite the family's travel to the United States; that trial counsel informed the American Embassy of the need for the presence of the applicant's family at the applicant's trial; that trial counsel arranged a meeting at the American Embassy for the applicant's family on July 3, 1997; and, that counsel also included a copy of the June 10, 1997 letter to the applicant's family. *See State's Exhibits A, January 26, 2005 Affidavit of Diana Olvera; State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit D, May 29, 1997 letter from John Castillo; State's Exhibit E, June 10, 1997 letter from Diana Olvera; State's Exhibit F, July 2, 1997 letter from Diana Olvera; State's Exhibit*

G, July 2, 1997 letter to American Embassy; State's Exhibit J, Fax Transmission Record of Fax to American Embassy.

38. The Court further finds, based on the credible affidavit of trial counsel, that trial counsel communicated with the applicant's family via telephone; that counsel told the applicant's family of the requirements for travel to the United States; that counsel first contacted the applicant's family by telephone on June 3, 1997, at a number provided by the applicant; that counsel believes that she spoke with the applicant's mother; that, although the call was brief, counsel identified herself, explained the applicant's situation, and requested their presence at the applicant's trial; that the applicant's mother stated they would call counsel back; and, that counsel encouraged the applicant's family to do so as soon as possible. *See State's Exhibits A, January 26, 2005 Affidavit of Diana Olvera; State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit K, Phone Record from June 3, 1997.*

39. The Court finds, based on the credible affidavit of trial counsel, that trial counsel received a call from the applicant's family on June 25, 1997, that, according to the applicant's sister, Somara Zalaya, there were reasons the family would have difficulty leaving Honduras for the applicant's trial, including their father's illness, economic reasons, and their father's murder of a neighbor. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit L, Phone Record from June 25, 1997.*

40. The Court further finds, based on the credible affidavit of trial counsel, that counsel also

called the applicant's family on June 26, 27, and July 2; that the applicant's mother, Zoila Zalaya, did not appear concerned for the applicant and was evasive in her responses during counsel's conversation with her on June 26, 1997; that Zoila Zalaya stated the applicant "knew what he was doing;" that Zoila Zalaya stated she would call counsel back and let counsel know what they could do; and, that counsel's assistants also noted that the applicant's mother exhibited an apparent lack of concern for the applicant's situation. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit M, Phone Records from June 26, 1997.*

41. The Court finds, based on the credible affidavit of trial counsel, that the Honduran Consulate was aware of the applicant's situation; that trial counsel informed the Honduran Consulate in person of the applicant's arrest, indictment and upcoming trial for capital murder; that counsel went to the Honduran Consulate on Monday, June 9, 1997; that counsel did not speak with the Consul General but made sure the consulate staff was aware of the applicant's situation; that counsel determined the Honduran Consulate would not be able to provide assistance in securing presence of the applicant's family at his trial based on counsel's conversation with the employee of the Honduran Consulate and counsel's experience in dealing with another foreign consulate; and, that counsel thereafter learned of and contacted the American Embassy in Honduras to ask for assistance in bringing the applicant's family members to Houston. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit N, Calendar Notation*

Regarding Honduran Consulate; State's Exhibit O, Honduran Consulate business card.

42. The Court finds, based on the credible affidavit of trial counsel, that the applicant knew of counsel's contact with the Honduran Consulate and did nothing to assist counsel's efforts to contact his family and did not want them contacted by the consulate or counsel. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera.*

43. The Court finds that, during the punishment phase of the trial, trial counsel presented letters from Mae J. Martin, an instructor from the Houston Community College System, regarding the applicant (XXI S.F. at 190); that according to Martin's letters, the applicant was enrolled in a class for English as a second language at the Harris County Jail in December 1996, and April and June, 1997; that the applicant was a serious and attentive student who was progressing well in English (XXI S.F. at 190-91); that the applicant had no other problems with the law and there was no evidence that the applicant committed terrible crimes in California (XXI S.F. at 219); and, that the applicant had no history of violent crime (XXI S.F. at 224).

44. The Court finds that trial counsel made reasonable, diligent efforts to secure the attendance of the applicant's family at the applicant's trial, notwithstanding the applicant's initial decision not to have his family contacted.

45. The Court further finds that information now asserted in the habeas affidavits of the applicant's family, i.e., that the applicant had a normal childhood and family, had no major injuries, illnesses, or problems with the law in Honduras, and

made average grade, is not significantly different than the evidence counsel presented at trial through the letters from Mae J. Martin.

VICTIM-IMPACT EVIDENCE

46. The Court finds, based on the credible affidavit of trial counsel, that trial counsel filed a pre-trial motion to conduct *voir dire* examination on victim impact testimony, a motion in limine regarding the complainant's character, and a motion for discovery of victim impact testimony; that the State provided discovery of the victim impact testimony before trial; that the testimony was in compliance with the information provided by the State before trial; that trial counsel did not object to the legally admissible victim impact testimony; and, that counsel made the strategic decision not to object to the testimony of the complainant's son. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

47. The Court finds that, during the punishment phase of the trial, Elin Paneque, the complainant's son, testified without objection about the effects of his mother's death on their family, including testimony that he had not been the same person for the last two years; that he did not sleep very well anymore; that he was fearful of trusting people; that he was in therapy for six months after his mother's death and was having to start therapy again; that he would never know his mother as an adult; and, that he was sworn in as a Untied State's citizen without his mother's presence (XXI S.F. at 184-86).

JURY INSTRUCTION - EXTRANEOUS OFFENSE

48. The Court finds that, prior to the testimony of Henry Nuila and outside the presence of the jury, the trial court addressed the effect on the applicant's motions in limine of the State's intention to elicit evidence from Henry Nuila that the applicant pointed a gun at him and asked Nuila to help him kill co-defendants Meza and Zaldivar (XIX S.F. at 136-7).

49. The Court finds that trial counsel objected to the admission of the evidence, arguing that it was irrelevant at the guilt-innocence phase of the trial; that it was precluded under TEX. R. EVID. 404(b) at this stage, and that trial counsel requested that the trial court do a balancing test under Rule 403 and find it unfairly prejudicial to admit the testimony during guilt-innocence (XIX S.F. at 137).

50. The Court finds that the trial court found that the evidence would be probative on the issue of consciousness of guilt (XIX S.F. at 137).

51. The Court finds that trial counsel, without waiving objection to the admission of evidence, alternatively requested that the trial court verbally give the jury a limiting instruction before the jury heard the extraneous testimony and the trial court informed counsel of the limiting instruction the trial court planned to give prior to the admission of such testimony (XIX S.F. at 138-9).

52. The Court finds that Henry Nuila testified that he met the applicant, known to him as "Dennis," at a house in Kenner, Louisiana on September 21 and 22, 1995; that the applicant was accompanied by two men; that the applicant told Nuila that he

murdered a woman in Houston; and, that the applicant suggested or requested that Nuila do something for him (XIX S.F. at 157-68).

53. The Court finds that after the prosecutor asked what the applicant had suggested or requested Nuila to do, trial counsel objected, saying "we renew our objection that we raised previously;" that the trial court stated that the ruling was the same; that Nuila then testified that the applicant told him he wanted help in killing the two men with him, would kill him if he did not help, and pulled out an Uzi (XIX S.F. at 168).

54. The Court finds that trial counsel then objected to the testimony that Nuila was about to give and re-urged counsel's previous objection; that the trial court overruled counsel's objection; and, that Nuila testified that the applicant pulled out a small machine gun and showed it to the applicant and said that he would also eliminate Nuila if he did not help (XIX S.F. at 169).

55. The Court finds that the trial court then verbally instructed the jury that "certain evidence was admitted before you regarding the defendant having allegedly committed an extraneous offense or offenses[;] such testimony is admitted for the purpose of aiding you, if it does aid you, in determining the guilty knowledge of the defendant, if any, and you must not consider that testimony for any other purpose" (XIX S.F. at 169).

56. The Court finds that, during cross-examination of Nuila, trial counsel attempted to impeach Nuila by eliciting evidence concerning Nuila's statement to Kenner, Louisiana police, his possible bias, and his seemingly illogical action of

leaving his sister and her family with the applicant in light of the applicant's admission and threat to Nuila (XIX S.F. at 184-91).

57. The Court finds that, at the conclusion of the guilt-innocence phase, the trial court instructed the jury that it was the exclusive judges of the facts, the credibility of witnesses and the weight to be given their testimony, and that trial counsel argued that the jury could choose to believe all, part, or none of Nuila's testimony (XX S.F. at 276, 285).

58. The Court finds that, at the conclusion of the guilt-innocence phase, the trial court instructed the jury that the State must prove the offense of capital murder or the lesser offense of felony murder beyond a reasonable doubt (XX S.F. at 266-9, 271-4).

59. The Court finds that, at the conclusion of the guilt-innocence phase, the trial court instructed the jury that certain evidence was admitted regarding the applicant allegedly having committed an extraneous offense or offenses; that such evidence was admitted for the purpose of aiding the jury, if it does aid the jury, in determining the guilty knowledge, if any, of the applicant; and, that the jury must not consider it for any other purpose (XX S.F. at 274).

60. The Court finds that Nuila's testimony was relevant to show consciousness of guilt, i.e., guilty knowledge, if any, of the applicant, and that Nuila's testimony concerning the extraneous offenses was relevant to rebut the demonstrated defensive theory that the applicant, if guilty, was only guilty of felony murder and that the applicant neither intended to cause the death of the complainant nor intended or

anticipated that the complainant's life would be taken.

61. The Court finds, based on the credible affidavit of trial counsel, that counsel reasonably chose not to request an instruction requiring the jury to consider the applicant's extraneous offenses only if the jury first found he committed them beyond a reasonable doubt because the jury was properly instructed during trial to consider the extraneous offense or offenses only for purposes of determining the applicant's guilty knowledge, if any, and the jury was given the appropriate instruction in the charge to consider the extraneous conduct only in determining guilty knowledge, if any, of the applicant and not to consider it for any other purpose. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

62. The Court finds the applicant's case is distinguishable from the holding in *Ex parte Varelas*, 45 S.W.3d 627 (Tex. Crim. App. 2001), where defense counsel was found ineffective for not requesting a limiting instruction for an extraneous admitted during guilt-innocence of a capital trial and for not requesting that the jury be instructed that it was required to find that the defendant committed the extraneous beyond a reasonable doubt when counsel later asserted that the lack of request was due to oversight and not based on strategy; the extraneous offenses were similar in nature to the charged offense; the State argued that the defendant must have been responsible for the victim's death because he committed the extraneous acts, and such extraneous acts were likely considered as direct evidence of the defendant's guilt.

JURY INSTRUCTION - LESSER INCLUDED OFFENSE

63. The Court finds that the trial court granted the applicant's request for an instruction on felony murder at the conclusion of the guilt-innocence phase of the trial, and that the trial court charged the jury that "a person commits the offense of felony murder if he commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual" (XX S.F. at 269-70).

64. The Court finds that the application paragraphs concerning felony murder in the guilt-innocence charge contained the phrase "committed an act clearly dangerous to human life, to wit: by strangling..." and did not include the phrase "cause the death" (XX S.F. at 271-3).

65. The Court finds that the applicant did not object to the guilt-innocence charge based on the absence of the phrase "cause the death" in the application paragraphs of felony murder.

66. The Court finds, based on the guilt-innocence charge as a whole, that the jury was aware that the offense of felony murder necessarily contains the element of the death of an individual and that it is unreasonable and improbable that the jury mistakenly believed that the distinction between felony murder and capital murder is whether the victim actually died.

REFRESHING MEMORY OF HENRY NUILA

67. The Court finds that, during direct examination, Henry Nuila testified that the applicant identified himself to Nuila as "Dennis" on the 20TH and 21ST in Kenner, Louisiana; that "Dennis" had a rose tattoo on his arm; that their conversation was in Spanish; that Nuila's sister was staying at their parents' house while their parents were in Honduras; that Nuila thought that "Dennis" was from Honduras; that "Dennis" said that he had come from Houston and they had murdered a female over there; and, that the other men with "Dennis" had "spoken too much" (XIX S.F. at 162-67).

68. The Court finds, during direct examination, the prosecutor asked Nuila whether the applicant said "he" or "they" did [the murder], and that Nuila replied "I can't really be specific on that" (XIX S.F. at 164-65).

69. The Court finds that, during direct examination, the prosecutor then showed Nuila State's Exhibit 118 and asked if he recognized it (XIX S.F. at 165); that Nuila identified State's Exhibit 118 as the statement he gave to the Kenner, Louisiana police after the incident with the applicant; that Nuila read his statement silently; that the prosecutor asked Nuila if that refreshed his memory concerning what he told the Kenner police about his conversation with the applicant; that Nuila stated that it did; and, that Nuila then testified "he" when asked if the applicant referred to "he" or "them" doing the killing (XIX S.F. at 165-7).

70. The Court further finds that, during cross-examination, Nuila again acknowledged that his memory was refreshed by his review of his

statement to the Kenner police, and that trial counsel attempted to impeach Nuila's memory of events (XIX S.F. at 187, 191-92).

71. The Court finds, based on trial counsel's cross-examination of Nuila, that Nuila's statement to Kenner police was made available to trial counsel, pursuant to former TEX. R. CRIM. EVID. 611, now enacted as TEX. R. EVID. 612.

72. The Court finds, based on the credible affidavit of trial counsel, that counsel did not object and had no need to object to the State's proper refreshing of Nuila's memory after he testified that he could not be specific about the particular statement he made. *State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

GUILT-INNOCENCE ARGUMENT

73. The Court finds that trial counsel argued at guilt-innocence that "I don't know what you make about her [Murr] changing her mind. All I know is here a month before trial and we come up with a completely different opinion from the same data with no formal second opinion" (XX S.F. at 289-91).

74. The Court finds that the prosecutor responded to trial counsel's argument by arguing that defense counsel "suggests there is something kind of nebulous about her [Dr. Murr] changing her opinion" [about cause of death], and that the prosecutor further argued that he did not think there was any question in jurors' minds that Murr would not change the cause of death for the prosecutor and the prosecutor would not ask that (XX S.F. at 305-6).

75. The Court finds, based on the credible affidavit of trial counsel, that trial counsel did not object to the prosecutor's argument about Dr. Murr amending the cause of death that was made in response "to an inference made during closing argument of defense counsel that was appropriate and did not require an objection," and that trial counsel made objections during jury argument that counsel thought were appropriate and beneficial to the applicant. *State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

First, Second, Third, and Fourth Grounds: Vienna Convention/alleged ineffective assistance of counsel

76. The Court finds that the applicant did not object either pre-trial or during trial to any alleged violation of the Vienna Convention on Consular Relations.

77. The Court finds, based on the appellate record, that the applicant told a pre-trial services interviewer on July 7, 1995, two months before the instant offense, that he was twenty-six years old and was born in Mexico, rather than Honduras (XXI S.F. at 80-1).

78. The Court finds, based on the credible affidavit of trial counsel, that the provisions of the Vienna Convention were complied with by trial counsel's informing the Honduran Consulate in person of the applicant's arrest, indictment and upcoming trial for capital murder. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera.*

79. The Court finds, based on the credible affidavit of trial counsel, that the applicant did nothing to assist counsel in efforts to contact his family and he did not want his family contacted by the Honduran Consulate, even though he was aware of counsel's contact with the Honduran Consulate. *Id.*

80. The Court finds that there is no affirmative showing that the applicant expressed to police or counsel any desire that the Honduran Consulate or any other foreign consulate be notified or that he be allowed to contact the Honduran Consulate or any other foreign consulate.

81. The Court finds that there is no affirmative showing that the applicant is a Honduran national, notwithstanding his family living in Honduras and trial counsel informing the Honduran Consulate of the applicant's arrest and indictment for capital murder.

82. The Court finds that trial counsel appointed experienced trial counsel Diana Olvera and Connie Williams to represent the applicant after the applicant's arrest; that counsel Olvera speaks Spanish; that that the applicant's skilled counsel were far more qualified to explain the Texas criminal justice system to the applicant than a representative of a foreign consulate; and, that the applicant was familiar with the criminal justice system as a result of his arrests and convictions prior to the instant offense.

83. The Court finds, based on the appellate record, that the applicant had lived in the United States in California and Houston; that the applicant had an apartment in Harris County; that applicant

had been living in that apartment for at least four months; that the applicant lived alone; that the applicant spoke English; that the applicant graduated from high school; and, that the applicant had been employed in the United States (XXI S.F. at 81-2).

84. The Court finds that the preamble of the Vienna Convention specifically provides that "the purpose of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992)(emphasis added).

85. The Court finds that, in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), the United States Supreme Court, assuming without deciding that the Vienna Convention might create some individual rights criminal defendants could invoke in a legal proceeding, held that the exclusionary rule does not apply to evidence obtained after a Vienna Convention violation; that ordinary state rules of procedural default may be properly applied to Vienna Convention claims; and, that the opinions of the International Court of Justice are not binding on United States courts.

86. The Court finds that, in *Sanchez-Llamas*, the Supreme Court further noted that the protections allegedly advanced by Article 36 of the Vienna Convention are provided by constitutional and statutory requirements already in place, including the right to an attorney and protection against compelled self-incrimination.

87. The Court finds that in, *Ex parte Jose Ernesto Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006), the Court of Criminal Appeals dismissed Medellin's subsequent application for postconviction writ of habeas corpus on the grounds that recent developments involving the Vienna Convention on Consular Relations do not constitute either a new factual or legal basis for a claim that could not have previously have been raised in prior writ applications, and that the International Court of Justice's decision in *Avena* does not trump procedural default provisions of art. 11.075, § 5, under the Supremacy Clause of the U. S. Constitution.

88. The Court finds that the United States Supreme Court subsequently granted Medellin's petition for certiorari to address the question of whether the President's memo sent to the Attorney General after the *Avena* decision constitutes an executive order and, if so, whether it exceeds the President's authority, and that the United States Supreme Court has not yet issued an opinion in Medellin's case.

89. The Court finds that the United States Supreme Court's consideration of the issue of the President's memo does not impact the disposition of the applicant's Vienna Convention claims in the instant writ proceeding.

90. The Court finds that the applicant was provided the statutory and constitutional protections afforded citizens of the United States, including right to counsel, and that trial counsel are not ineffective for not objecting to the constitutionality of

the applicant's death sentence based on an alleged violation of the Vienna Convention.

Fifth, Sixth, and Seventh Grounds: alleged false testimony/witness Henry Nuila

91. The Court finds that the applicant presents the hearsay habeas affidavit of defense investigator Gerald Bierbaum asserting that Rolando Guitterez, Roberto Meza and Franklin Torres allegedly told Bierbaum that Henry Nuila was allegedly not present in the house [Kenner, Louisiana house] on the evening prior to the arrest. *See applicant's writ exhibit o.*

92. The Court finds that the hearsay affidavit of the defense investigator does not constitute competent, supported evidence; thus, it is not dispositive of any habeas claims.

93. The Court finds, based on the credible affidavits of prosecutors Bill Hawkins and Don Smyth, that they had no reason to believe that Nuila was not present at the house as he testified; that they met with co-defendant Zaldivar who never stated anything inconsistent with the witnesses' testimony, including Nuila's testimony; that they initially planned to call Zaldivar as a witness but did not because of Zaldivar's fear of the applicant; and, that they did not suppress *Brady* information. *See State's Exhibits B and C, Affidavits of prosecutors Bill Hawkins and Don Smyth, respectively.*

94. The Court finds that jury was free to accept or reject any or all portions of Henry Nuila's testimony, and the Court further finds that the State did not knowingly present false testimony of Henry Nuila and did not suppress any alleged statement of

Zaldivar purportedly indicating that Nuila was not present in the Kenner, Louisiana house.

CONCLUSIONS OF LAW

First Ground: alleged ineffective assistance of counsel

1. Trial counsel are not ineffective for making the reasonable, strategic decision to agree with the State to excuse prospective jurors who maintained that they would always give the death penalty regardless of the circumstances and to excuse prospective jurors who maintained that they would never give the death penalty regardless of the circumstances, in light of questioning by the trial court establishing that such prospective jurors were challengeable for cause. *See* TEX. CODE CRIM. PROC. art. 35.16 (a)(9) and (b)(3); *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App.1999)(noting that any prospective juror who would automatically answer special issues so that death penalty would result is challengeable for cause for having bias or prejudice against law applicable to case on which defense entitled to rely).

2. Because the applicant's habeas contention of ineffective assistance of counsel, based on alleged failure to show that the applicant was allegedly guilty, if guilty, only of felony murder and to show that the applicant allegedly neither actually caused the complainant's death nor intended or anticipated that the complainant's life would be taken, are actually attacks on the sufficiency of the evidence, such habeas claims are not cognizable in state writ proceedings. *See Ex parte Christian*, 760 S.W.2d 659 (Tex. Crim. App. 1988).

3. In the alternative, trial counsel cannot be considered ineffective for not showing that the applicant was allegedly guilty only of felony murder or not showing that the applicant allegedly neither actually caused the death of the complainant nor intended or anticipated that the life of the complainant would be taken, in light of trial counsel's apparent and reasonable, albeit unsuccessful, strategy to show that the applicant, if guilty, was only guilty of the lesser included offense of felony murder and that the applicant neither intended to cause the death of the complainant nor intended or anticipated that the complainant's life would be taken. *Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981)(holding that fact that another attorney might have pursued different strategy will not support finding of ineffectiveness of counsel); *see also Rachal v. State*, 917 S.W.2d 799, 805 (Tex. Crim. App. 1996)(holding that reconciliation of conflicts in witnesses' testimony is within exclusive province of jury).

4. Trial counsel are not ineffective for employing the reasonable trial strategy of not having the applicant testify based on the amount of physical evidence that would be introduced at trial, the language problem, the intelligence level of the applicant, his ability to withstand cross-examination, and the fact that the applicant's testimony would have opened the door to his extraneous offenses. *See Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993)(noting that counsel's strategic choices made after thorough investigation of relevant law and facts are "virtually unchallengeable"); *see also Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978)(holding that trial

strategy will be reviewed only if record shows that action was without plausible basis).

5. Trial counsel cannot be considered ineffective based on the applicant's family not attending the applicant's trial, in light of the applicant's numerous, initial assertions that he did not want his family contacted and in light of trial counsel's extensive efforts to attempt to secure the presence of the applicant's family from Honduras after the applicant changed his mind. *See Sonnier v. State*, 914 S.W.2d 511, 522 (Tex. Crim. App. 1995)(holding counsel not ineffective for following defendant's expressed wishes not to present punishment evidence in capital case); *Wilkerson v. State*, 726 S.W.2d 542, 551 (Tex. Crim. App. 1986)(holding that, absent showing that witnesses were available or that their testimony would have benefited defendant, claim of ineffective assistance of counsel cannot be sustained); *cf. Rompilla v. Beard*, 545 U.S. 374, 388-90 (2005)(noting difference between counsel failing to pursue "sure bet" investigation of information in easily-available State's file of prior conviction, knowing that State intended to introduce evidence, and debatable obligation to pursue some "potential lines of enquiry).

6. Trial counsel fails to show ineffective assistance of trial counsel based on lack of objection to Elin Paneque's proper victim impact testimony about the effects of the death of his mother, the complainant, on his family. *Payne v. Tennessee*, 501 U.S. 808 (1991(holding that eighth amendment is not *per se* bar to admission of evidence of victim's personal characteristics or impact of victim's death upon his family and loved ones; noting that

relevancy of victim-character or victim-impact evidence is tied to jury's decision at punishment); *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998)(holding that "both victim impact and victim character are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence."); *Solomon v. State*, 49 S.W.3d 356 (Tex. Crim. App. 2001)(holding that admission of photos of victim's wedding, victim in his uniform, victim's children, and victim swimming with his children did not constitute inadmissible victim impact evidence).

7. The applicant fails to ineffective assistance of counsel based on trial counsel not requesting a jury instruction that the jury must find that the applicant committed extraneous misconduct beyond a reasonable doubt before the jury could consider evidence of such conduct, in light of (a) trial counsel objecting to the admission of the extraneous offense or offenses based on lack of relevance and prejudice outweighing probative value; (b) trial counsel requesting that the trial court give a limiting instruction; (c) trial court verbally instructing the jury during Nuila's testimony and also instructing the jury in the guilt-innocence charge that the extraneous offense or offenses were admitted for the purpose of aiding the jury, if it does aid the jury, in determining the guilty knowledge, if any, of the applicant and not for any other purpose; (d) trial counsel's making a reasonable strategic decision not to request an instruction concerning the burden of proof of such offense or offenses; and (e) such testimony rebutting the applicant's defensive theory that he did not intend or anticipate the

complainant's death. *See Ransom v. State*, 920 S.W.2d 288, 299-301 (Tex. Crim. App. 1996)(holding that trial court did not abuse its discretion in admitting extraneous offenses during guilt-innocence of capital trial to show consciousness of guilt and to rebut defensive theories raised by cross-examination of State's witnesses); *see also Delgado v. State*, 235 S.W.3d 244, 253 (Tex. Crim. App. 2007)(noting defendant is entitled to limiting instruction on use of extraneous offenses during guilt phase only if he first requests those instruction when evidence introduced; noting that trial counsel could make a strategic decision not to request such instruction); *cf. Jackson v. State*, 992 S.W.2d 469, 477 (Tex. Crim. App. 1999)(reaffirming holding that no burden of proof instruction for extraneous offense admitted during punishment phase of capital trial where jury properly charged on burden of proof for special issue(s)).

8. The applicant fails to show ineffective assistance of counsel for lack of objection to the guilt-innocence charge based on the absence of the phrase "cause the death" in the application paragraphs of felony murder; the charge, when read as a whole, instructed the jury that the offense of felony murder necessarily includes the death of the complainant. *See Smith v. State*, 541 S.W.2d 831, 839 (Tex. Crim. App. 1976)(holding jury charge must be read as a whole when reviewing).

9. Trial counsel are not ineffective for lack of objection to the State's proper refreshing of Henry Nuila's memory with his written statement to Kenner police after Nuila testified that he could not remember a specific part of the statement. *See*

former TEX. R. CRIM. EVID. 611, now TEX. R. EVID. 612; *Welch v. State*, 576 S.W.2d 638, 641 (Tex. Crim. App. 1979)(holding counsel may attempt to refresh witness' memory when witness has personal knowledge at some point in the past but cannot now remember).

10. Trial counsel are not ineffective for properly responding to trial counsel's jury argument concerning Dr. Murr amending the cause of the complainant's death. *Harris v. State*, 784 S.W.2d 5, 12 (Tex. Crim. App. 1989)(holding that counsel during jury argument may properly summarize evidence, make reasonable inferences from evidence, answer argument of opposing counsel, and make plea for law enforcement).

11. The applicant fails to show that his constitutional rights were violated based on alleged ineffective assistance of trial counsel.

First, Second, Third, and Fourth Grounds: Vienna Convention/alleged ineffective assistance of counsel

12. The applicant did not object either pre-trial or during trial based on any alleged violation of the Vienna Convention on Consular Relations; thus, the applicant is procedurally barred from presenting such habeas claim. *See Sanchez-Llamas*, 126 S.Ct. at 2687 (holding that states may apply procedural default rules to Convention claims); Tex. R. APP. P. 33.1(a); *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978); *see also Hughes v. Johnson*, 191 F.3d 607, 614 (5TH Cir. 1999)(holding that defendant's failure to comply with Texas contemporaneous objection rule constituted

adequate and independent state-law procedural ground sufficient to bar federal habeas).

13. In the alternative, the applicant fails to show a violation of the Vienna Convention based on trial counsel contacting the Honduran Consulate and making the consulate aware that the applicant had been arrested and charged with capital murder and was awaiting trial for capital murder.

14. In the alternative, the applicant fails to affirmatively establish that he is a Honduran national and he fails to show that his constitutional rights, pursuant to U.S. CONST. amends. VI, VIII, and XIV, were violated based on an alleged violation of the Vienna Convention. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985)(holding applicant must plead and prove facts which, if true, entitle him to relief); *Ex parte Barber*, 879 S.W.2d 889 (Tex. Crim. App. 1994)(holding that applicant must show that complained-of error affected fact or length of confinement in order to be cognizable on habeas); *see also Sierra v. State*, 218 S.W.3d 85, 87-8 (Tex. Crim. App. 2007)(holding that treaties do not constitute "laws" for purpose of art. 38.23 and declining to reconsider statutory analysis and holding in *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000)).

15. The applicant fails to show ineffective assistance of counsel based on counsel not objecting to the constitutionality of his sentence based on an alleged violation of the Vienna Convention. *See Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. app. 1999)(holding appellate court's judicial scrutiny of counsel's performance must be highly deferential when reviewing claim of ineffective assistance and

representation is not to be judged by hindsight or by facts unknown at time of trial).

Fifth, Sixth, and Seventh Grounds: alleged false testimony/witness Henry Nuila

16. Because defense investigator Bierbaum's hearsay affidavit is not substantive evidence, it provides no evidence to support the applicant's meritless claim that the State either presented false testimony through witness Henry Nuila or suppressed evidence, i.e., Zaldivar supposedly indicating that Nuila was not present in the house, based on the hearsay affidavit of defense investigator. *See Hogue v. Johnson*, 131 F.3d 466, 505 (5th Cir. 1997)(noting hearsay affidavit is not substantive evidence of anything). Thus, the applicant fails to show a *Brady* violation. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963); *see also May v. Collins*, 904 F.2d 228, 232 (5TH Cir. 1990)(citing *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988)(holding that State not obligated to furnish information available to defendant or that could be obtained through reasonable diligence)); *See Castellano v. State*, 863 S.W.2d 480 n.4 (Tex. Crim. App. 1993)(citing *Mooney*, 294 U.S. at 112, 55 S. Ct. at 342)(noting no due process violation where State has no knowledge of perjured testimony and knowledge is not imputed)).

17. In the alternative, the applicant fails to show that such information, other than being merely helpful or favorable, if at all, was material to the applicant's guilt or punishment in light of the record as a whole, including evidence of the applicant's fingerprints on the tape found around the complainant's ankles. *See United States v. Bagley*,

473 U.S. 667, 105 S.Ct. 3375 (1985); *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989)(adopting materiality standard set forth by Supreme Court in *Bagley* and holding that reasonable probability is probability sufficient to undermine confidence in outcome); *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 1568 (1995)(citing *Bagley*, 473 U.S. at 675, 105 S. Ct. at 3380)(noting that materiality is determined by considering evidence collectively and prosecution's knowledge of item of favorable evidence unknown to defendant does not, alone, constitute *Brady* violation).

18. The applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amends. VIII and XIV, were violated by presentation of Henry Nuila's testimony.

19. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

CAUSE NUMBER 754409-A

EX PARTE	IN THE 230TH DISTRICT COURT
CARLOS MANUEL AYESTAS, APPLICANT	OF HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 754409-A and transmit same to the Court of Criminal Appeals, as provided by TEX. CODE CRIM. PROC. art. 11.071; the transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 754409-A, including his application for writ of habeas corpus;
2. all of the Respondent's pleadings filed in cause number 754409-A, including the Respondent's Original Answer;
3. this court's findings of fact, conclusions of law and order denying relief in cause no. 754409-A;
4. any proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent in cause no. 754409-A; and,
5. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 754409, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Kurt Wentz, 5629 FM 1960 Road W, Suite 115, Houston, Texas 77069 and to Respondent: Neelu Sachdeva; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002.

* * *

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 754409-A.

SIGNED this 18 day of February 2008.

/s/ Belinda Hill
BELINDA HILL
Presiding Judge
230th District Court
Harris County, Texas

APPENDIX Y

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-69,674-01

EX PARTE CARLOS MANUEL AYESTAS

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 754409-A IN THE 230TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY

Per curiam.

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

In July 1997, a jury convicted applicant of the offense of capital murder. The jury also answered the special issues submitted pursuant to Article 37.071 of the Texas Code of Criminal Procedure in the favor of the State. The trial court, accordingly, set punishment at death. This Court subsequently affirmed applicant's conviction and sentence on direct appeal in an unpublished opinion. *Ayestas v. State*, No. AP-72,928 (Tex. Crim. App. delivered Nov. 4, 1998).

In this writ application, applicant presents seven allegations, including ten sub-allegations of ineffective assistance of counsel, in which he

challenges the validity of his conviction and the resulting sentence. The trial judge entered findings of fact and conclusions of law recommending that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial court's recommendation and adopt the trial judge's findings and conclusions except for the following: Findings of Fact 10, 23, 24, 54, 78, and 84 and Conclusions of Law 2, 7(d), 10, 13, and 17. Based upon these findings and conclusions and our own review of the record, relief is denied.

IT IS SO ORDERED THIS THE 10TH DAY OF SEPTEMBER, 2008.

Do Not Publish

* * *

APPLICANT CARLOS MANUEL AYESTAS

APPLICATION NO. 69,674-01

11.071 APPLICATION FOR WRIT OF HABEAS CORPUS XXX

DENY HABEAS CORPUS APPLICATION WITH WRITTEN ORDER.

/s/ Per Curiam 9/10/08

JUDGE DATE

APPENDIX Z

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARLOS AYESTAS,	§	
Petitioner,	§	
	§	
v.	§	
	§	
RICK THALER,	§	CIVIL ACTION NO.
Director, Texas	§	H-09-2999
Department of Criminal	§	
Justice-Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Carlos Ayestas has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state court conviction and death sentence for capital murder. Respondent Rick Thaler has filed a motion for summary judgment. Having carefully considered the petition, the summary judgment motion, the state court record, the parties' submissions, and the applicable law, the court will grant respondent's motion for summary judgment and will deny Ayestas's petition for a writ of habeas corpus, entering final judgment by separate order. The reasons for these rulings are set out in detail below.

I. Background[1]

Ayestas was convicted of capital murder for murdering Santiaga Paneque during the course of committing or attempting to commit robbery or burglary. About two weeks before the murder, Ayestas and a friend went to look at a car offered for sale by Anna McDougal, who lived across the street from Paneque. McDougal went inside her house for about 15 minutes while the men inspected the car. When she came back outside, McDougal saw the two men leaving Paneque's house. When she asked what they were doing, the men told McDougal that Paneque called them over to look at some furniture she was trying to sell.

Paneque's son, Elin, left the house at about 8:30 a.m. on September 5, 1995. He returned home for lunch at 12:23 p.m.[2] and rang the doorbell, but there was no response. He put his key in the doorknob, but noticed that the door was unlocked. Upon entering, he saw that the room was ransacked and items were missing. The rest of the house was in much the same condition. Elin went to the house of a neighbor, Maria Diaz, and called 911. Upon returning to his house, he found his mother's body on the floor of the master bathroom. She had silver duct tape on her ankles. Elin returned to Diaz's house and asked her to go make sure that his mother was dead. Diaz entered the Paneque house and

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[1] This statement of facts is adapted from the Texas Court of Criminal Appeals ("TCCA") opinion affirming Ayestas's conviction and sentence. *See Ayestas v. State*, No. 72,928 (Tex. Crim. App. Nov. 4, 1998). Where this opinion diverges from, or expands upon, the TCCA's discussion of the facts, the difference will be noted by a specific citation to the record.

[2] He stated that he specifically noted the time.

called Ms. Paneque's name. She found Ms. Paneque lying face down on the floor. Her face was a dark color and she was not breathing.

Detective Mark Reynolds of the Harris County Sheriff's Department testified that the house was ransacked but bore no signs of forced entry. Paneque's body was face down in a pool of blood and vomit. Her wrists were bound with the cord from an alarm clock and then wrapped in silver duct tape. She also had duct tape over her eyes and around her neck. Reynolds also testified that it was apparent that Paneque was beaten. Her face was swollen and covered with cuts and bruises. Reynolds showed neighbors photographs of two suspects and McDougal identified them as the same two men who were in Paneque's house about two weeks before the murder. One of the suspects was Petitioner and the other was Frederico Zaldivar.

An autopsy conducted by Dr. Marilyn Murr, an assistant medical examiner for Harris County, revealed that Paneque suffered multiple blows while she was still alive, resulting in numerous bruises and lacerations. She had fractured bones in her right elbow and neck, and bruises on each side of her pelvic area, just above the hips. An internal examination revealed extensive hemorrhaging in the neck and head. She had another fracture, caused by a "significant amount of force," in the roof of the orbit containing her right eye. Dr. Murr determined that none of these injuries was substantial enough to kill Paneque. The cause of death was asphyxiation due to continual pressure applied to her neck for three to six minutes. Dr. Murr testified that her initial report indicated asphyxiation by ligature

strangulation, but she reexamined the evidence shortly before trial at the request of the prosecutor. She then changed her conclusion to "asphyxiation due to strangulation," which allowed for the possibility that a hand or hands might have caused the asphyxia.

Police recovered fingerprints from the crime scene. Two prints recovered from the tape around Paneque's ankles, and two recovered from the roll of tape, matched Ayestas. On cross examination, the defense brought out that the two prints on the tape around Paneque's ankles were only discovered shortly before trial, approximately 20 months after the murder, based on a reexamination undertaken at the prosecutor's request.

Henry Nuila testified that he met Ayestas in mid-September 1995 at Ayestas's sister's house in Kenner, Louisiana. On September 20, an intoxicated Ayestas told Nuila that he was involved in the murder of a woman in Houston. Ayestas asked Nuila for help in killing the other two participants in the murder because "they had spoken too much." Ayestas told Nuila that, if he declined, Ayestas would kill him. Ayestas brandished a gun. Nuila kept Ayestas talking until Ayestas passed out. Nuila then called the police. They arrested Ayestas, still in possession of the gun. Based on this evidence, the jury found Ayestas guilty of capital murder for murdering Paneque during the commission or attempted commission of a burglary, robbery, or both.

During the penalty phase, the State presented evidence that Ayestas served time in prison in California and Texas for possession, and purchase

for sale, of narcotics, burglary, and misdemeanor theft. He was also the subject of a California warrant for illegal transportation of aliens. Candelario Martinez testified that three days after the murder, Ayestas approached him outside a motel where he was waiting for a friend. After a brief conversation, Ayestas pulled a gun on Martinez and ordered him into one of the rooms. Martinez's friend was also in the room. Ayestas ordered Martinez onto the floor and threatened to kill him. Ayestas and two others took Martinez's personal belongings and forced him into the bathroom, where they again told him that they would kill him. Martinez begged for his life as the three discussed who would kill him. Ayestas finally said that he would let Martinez live, but threatened to kill his family if Martinez told the police. Ayestas and his accomplices left in Martinez's truck.

Based on this evidence, along with the evidence of the brutality of Paneque's murder, the jury found that there is a likelihood that Ayestas would commit future acts of criminal violence posing a continuing threat to society, that Ayestas actually caused Paneque's death or intended to kill her or anticipated that a human life would be taken, and that the mitigating evidence did not warrant a sentence of life imprisonment. Accordingly, the trial court sentenced Ayestas to death.

The TCCA affirmed Ayestas's conviction and sentence, *Ayestas v. State*, No. 72,928 (Tex. Crim. App. Nov. 4, 1998), and denied his application for habeas corpus relief, *Ex parte Ayestas*, No. WR-69,674-01 (Tex. Crim. App. Sept. 10, 2008). Ayestas filed a petition for a writ of habeas corpus in this

Court on September 11, 2009. Thaler moved for summary judgment on April 9, 2010, and Ayestas responded to that motion on October 26, 2010.

II. The Applicable Legal Standards

A. The Antiterrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999). For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this court may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, this court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially

indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000)).

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003). The sole inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir.

2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. The Standard for Summary Judgment in Habeas Corpus Cases

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). In ordinary civil cases a district court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Where, however, a state prisoner's factual allegations have been resolved against him by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that

the presumption of correctness established by 28 U.S.C. § 2254(e)(1) should not apply, it is inappropriate for the facts of a case to be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981). In reviewing factual determinations of the Texas state courts, this court is bound by such findings unless an exception to 28 U.S.C. § 2254 is shown.

III. Analysis

A. Ineffective Assistance of Counsel

In his first two claims for relief, Ayestas contends that his counsel rendered ineffective assistance. First, he alleges that counsel was ineffective during the penalty phase by failing to investigate and present mitigating evidence.Specifically, he contends that counsel failed to develop evidence of: (a) his good character traits; (b) his kindness and reputation for helping those less fortunate; and (c) his lack of criminal history in his native Honduras; that (d) his co-defendant, Francisco Zaldivar, was a bad influence on him; and (e) he suffers from mental illness, alcoholism, and drug addiction. Second, he alleges that counsel was ineffective at the guilt/innocence phase by failing to: (a) object to a jury charge; (b) object to an allegedly racially discriminatory jury strike; (c) perform a complete *voir dire* regarding jurors' conscientious scruples against the death penalty; (d) object to a statement by the prosecutor; and (e) object to the failure of the police to inform Ayestas of his right to contact the Honduran consulate.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

1. Procedural Default

Ayestas did not present sub-claims 1 (b) and (e), and 2 (a) and (b) to the TCCA. The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). As the Fifth Circuit explained in a pre-AEDPA case, "federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds. "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman v. Cain*, 228 F.3d 616, 619-20 (5th Cir. 2000). This rule extends to the evidence establishing the factual allegations themselves. *Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989) (citing 28 U.S.C. § 2254(b)); *see also Jones v. Jones*, 163 F.3d 285, 298 (5th Cir. 1998) (noting that "[s]ubsection (b)(1) [of AEDPA] is substantially identical to pre-AEDPA § 2254(b)").

A petitioner fulfills the exhaustion requirement, however, if "all crucial factual allegations were before the state courts at the time they ruled on the merits" of the habeas petition. *Dowthitt v. Johnson*, 230 F.3d 733, 746 (5th Cir. 2000). This court may also consider evidence presented for the first time in federal habeas proceedings if the evidence supplements, as opposed to fundamentally altering, claims presented to the state court. *Morris v. Dretke*, 379 F.3d 199, 204-05 (5th Cir. 2004); *Dowthitt*, 230 F.3d at 746. If the petitioner presents material evidentiary support for the first time in federal court, then he has not exhausted his state remedies. *Morris*, 379 F.3d at 204-05.

Ayestas's evidence of his kindness and reputation for helping others merely supplements his exhausted claim that he has good character traits. Therefore,

subclaim 1(b) is properly before this Court. Ayestas's evidence of his alleged mental illness and substance abuse, however, raises a new, unexhausted, claim, as do his claims that counsel failed to object to the jury charge and the alleged racially discriminatory jury strike.

Ordinarily, a federal habeas petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state forum to present his unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). Such a result in this case, however, would be futile because Petitioner's unexhausted claims would be procedurally barred as an abuse of the writ under Texas law. On habeas review, a federal court may not consider a state inmate's claim if the state court based its rejection of that claim on an independent and adequate state ground. *Martin v. Maxey*, 98 F.3d 844, 847 (5th Cir. 1996). A procedural bar for federal habeas review also occurs if the court to which a petitioner must present his claims to satisfy the exhaustion requirement would now find the unexhausted claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

The Texas abuse of the writ statute, TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a), provides, in relevant part, that the TCCA may not consider a subsequent habeas application unless a petitioner can show either that the claim could not have been timely raised in state court or that the claim raises a compelling federal claim:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the

> merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> >
> > (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
> >
> > (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial . . .

TEX. CODE CRIM. PROC. ANN. art. 11.071. The TCCA has held that, to avoid dismissal under § 5(a), a petitioner must satisfy *both* the state procedural requirement of § 5(a)(1) *and* the federal constitutional merits requirements of § 5(a)(2) or 5(a)(3). *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) ("We have interpreted [§ 5(a)] to mean that . . . 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and

2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence.").

Petitioner argues that because the TCCA's standard boilerplate dismissal under § 5(a) does not specify whether dismissal was premised on a failure to satisfy state procedural law or on the merits, federal courts must presume that unexhausted claims are not necessarily procedurally defaulted. In support, he cites *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007), in which the Fifth Circuit concluded that no adequate and independent state procedural basis for dismissal could be discerned from the TCCA's "boilerplate" dismissal under § 5(a). *Ruiz*, however, is distinguishable. There, it was plain that an assessment of the merits played a significant role in the dismissal. One TCCA panelist filed a concurring opinion concluding that Ruiz did not allege a meritorious Sixth Amendment claim. Two other panelists filed a dissent from the dismissal, urging the merits of the Sixth Amendment claim. *Id.* at 528.

The facts of this case are much more like those in *Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008), *cert. denied*, 129 S.Ct. 2378 (2009). In that case the Fifth Circuit concluded that an adequate and independent state procedural basis for dismissal was evident because it was plain that the factual and legal bases for the petitioner's claims were available well before he filed his subsequent habeas application, and because there was "nothing in [the TCCA's] perfunctory dismissal of the claims that suggest[ed] that it actually considered or ruled on

the merits." *Id.* at 342. Petitioner does not contend that the factual or legal bases for these claims were unavailable when he filed his initial habeas petition. Because the claims were available, it is clear that the TCCA would dismiss any successive application under the independent and adequate state procedural bar of § 5(a)(1). That bar precludes this Court from reviewing Petitioner's claim absent a showing of cause for the default and actual prejudice attributable to the default, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

"Cause" for a procedural default requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule, or a showing of a prior determination of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). Petitioner makes no such showing.

A "miscarriage of justice" means actual innocence, either of the crime for which he was convicted or of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). "Actual innocence of the death penalty" means that, but for a constitutional error, he would not have been legally eligible for a sentence of death. *Id.* Ayestas makes no showing that he is actually innocent of capital murder, or that he is legally ineligible for a death sentence. Therefore, his unexhausted claims are procedurally defaulted.

2. Failure to Investigate/Penalty Phase

Ayestas contends that several of his family members would have come to the United States from Honduras to testify if asked. He claims that they would have testified about his upbringing and good character and reputation for kindness. Citing affidavits submitted by family members, Ayestas contends that they would have testified that he grew up in a stable, middle class environment, and had a good relationship with his siblings and step siblings. Ayestas states that it is unusual in Honduras for step siblings to have a good relationship. Ayestas was a well-behaved child. Ayestas states that the family moved when Ayestas was 12 years old. He continued to do well in school and was a devout Catholic. He was never in trouble with the law as a child. He left home when he was 18. He told his family that he was going to Guatemala, but left a note in his room saying that he went to the United States instead. He returned to Honduras several times, always staying with his parents when he did.

Ayestas states that the last time he returned to Honduras was 1994, after his incarceration in California. He told his family that if someone came looking for him, they were to say he was not home. Frederico Zaldivar, Ayestas's co-defendant in this case, began to come to the house looking for Ayestas. The family refused to tell Zaldivar where Ayestas was and asked him to leave Ayestas alone. They regarded Zaldivar as a bad influence. Ayestas also contends that counsel would, with minimal investigation, have found evidence that he had no criminal record in Honduras.

The state habeas court found, based on a credible affidavit by trial counsel, that counsel, among other things, interviewed witnesses, talked to Ayestas's family, employed an investigator, reviewed juror questionnaires, spoke to Ayestas about his background and life, and attempted to secure the presence of Ayestas's family at trial. 3 SH. at 647.[3] Regarding the attendance of the Ayestas family at trial, the state court found that Ayestas repeatedly told counsel that he did not want his family to attend the trial and did not agree to have his family contacted until after jury selection was complete. The court also found that counsel made every effort to contact the family after Ayestas permitted her to do so. S.H. at 651. The court further found that the defense investigator sent a letter to the family in Honduras on May 29, 1997, six weeks before the penalty phase began. Counsel sent a second letter on June 10, 1997, stating that Ayestas finally agreed to let counsel contact his family. Counsel sent a third letter on July 2, 1997, and faxed a letter to the United States embassy in Honduras to expedite the family's travel to the United States. Counsel informed the embassy of the need for the family's presence at trial, arranged a July 3, 1997, meeting for the family at the embassy, and included a copy of the June 10, 1997, letter. The court also found that counsel communicated with the Ayestas family by phone beginning on June 3, 1997. She spoke with Ayestas's mother, explained the situation, and requested the family's presence at trial. Ayestas's mother said she would call back. Counsel heard from the family on June 25, when Ayestas's sister,

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[3] "SH" refers to the transcript of Ayestas's state habeas corpus proceeding.

Somara Zalaya, informed counsel that the family would have difficulty leaving Honduras for the trial. Among the reasons stated were their father's illness and economic reasons. Counsel called the family again on June 26 and 27, and July 2. Ayestas's mother appeared unconcerned and gave evasive responses. Counsel's assistants also noted the mother's apparent lack of concern. The Court further found that counsel informed the Honduran consulate of Ayestas's arrest, indictment, and upcoming trial on June 9, 1997. SH. at 651-653. The court found that counsel was not ineffective based on the failure of petitioner's family to attend trial "in light of the [petitioner's] numerous, initial assertions that he did not want his family contacted and in light of trial counsel's extensive efforts to attempt to secure the presence of [petitioner's] family from Honduras after [he] changed his mind." SH. at 665.

During the penalty phase, counsel presented letters from an instructor in the Houston Community College system who taught Ayestas in an English as a second language program at Harris County Jail. She stated that Ayestas was a serious and attentive student, had no other problems with the law, and had no history of violent crime. SH. at 653.

Based on this evidence, the Court found that counsel made diligent efforts to secure the family's presence at trial. The Court also found that the evidence the family would have offered regarding Ayestas's childhood and background was not significantly different from the evidence in the instructor's letters. SH. at 654.

Counsel has a duty to investigate possible mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003). The record establishes, however, that counsel did attempt to investigate and develop evidence concerning Ayestas's background and childhood.

First, Ayestas instructed counsel not to call his family. Neither the Supreme Court nor the Fifth Circuit has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence. In fact, the Fifth Circuit has held on several occasions that a defendant cannot instruct his counsel not to present evidence at trial and then later claim that his lawyer performed deficiently by following those instructions. In *Autry v. McKaskle*, 727 F.2d 358 (5th Cir. 1984), the defendant prevented his attorney from presenting any mitigating evidence during the punishment phase of his capital trial. The Fifth Circuit rejected Autry's claim that counsel was ineffective for heeding his instructions: "If Autry knowingly made the choices, [his lawyer] was ethically bound to follow Autry's wishes." *Id.* at 362;[4] *see also Nixon v. Epps*, 405 F.3d 318, 325-26 (5th Cir. 2005) (finding that counsel was not ineffective for failing to present additional mitigating evidence over client's objection: "A defendant cannot block his counsel from attempting one line of defense at trial, and then on appeal assert that counsel was ineffective for failing to introduce evidence supporting that defense."); *Roberts v.*

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[4] The *Autry* court also rejected the defendant's claim that counsel was required to request a competency hearing before agreeing to comply with the client's decisions. *Id.*

Dretke, 356 F.3d 632, 638 (5th Cir. 2004) (noting that defendant may not obstruct attorney's efforts, then claim ineffective assistance of counsel); *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000) (finding that counsel was not ineffective for failing to call family members during punishment phase where defendant stated that he did not want family members to testify).[5] Second, the state court's finding that counsel acted promptly and reasonably to secure the family's presence once Ayestas relented is amply supported by the record. Therefore, Ayestas fails to demonstrate deficient performance.

3. Guilt/Innocence Phase

As noted above, Ayestas's claims that counsel was ineffective for failing to object to the jury charge and to an allegedly racially discriminatory jury strike are unexhausted and procedurally defaulted.

a. Failure to Perform Complete *Voir Dire*

In his first non-defaulted claim of ineffective assistance of counsel during the guilt/innocence phase, Ayestas contends that his counsel was ineffective for failing to effectively *voir dire* potential jurors who expressed opposition to the death penalty and in failing to object to the dismissal of these potential jurors. In *Witherspoon v. Illinois*, 391 U.S.

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[5] *Cf. Schriro v. Landrigan*, 550 U.S. 465, 475-77 (2007) (stating that, if defendant instructed counsel not to present mitigating evidence, "counsel's failure to investigate further could not have been prejudicial under *Strickland*"); *Amos v. Scott*, 61 F.3d 333, 348-49 (5th Cir. 1995) (denying ineffective assistance claim for want of prejudice where defendant "strongly opposed" presenting any witnesses during punishment phase of trial).

510 (1968), the Supreme Court noted that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it." *Id.* at 519. Accordingly, the Court held that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Id. at 522. In *Adams v. Texas*, 448 U.S. 38, 45 (1980), the Court clarified that *Witherspoon* established "the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror . . . ."

In this case, 14 venire members were dismissed, without objection, after expressing opposition to the death penalty. Before dismissing them, however, the trial court spoke individually to each venire member in an effort to determine if the juror could set aside personal feelings and consider the death penalty. For example, the court stated to one such group of prospective jurors:

> [M]y question specifically is going to be to you this: is what you're saying that no matter what the facts of the case, under no situation

> ever could you ever consider death as a possible punishment?

11 Tr. at 120. In response to this question, some jurors asserted that they could not, under any circumstances, vote to impose the death penalty. Others stated that they could in an appropriate case. *Id.* at 120-22. The jurors who were eventually dismissed stated that they could never impose a death sentence. Clearly, a juror who could never consider a death sentence holds "views [that] would prevent or substantially impair the performance of his duties as a juror . . . ." *Adams*, 448 U.S. at 45. Because the jurors in question stated that they could never vote to impose a death sentence, any failure by Ayestas' counsel to attempt to rehabilitate them and any objection to their dismissal would have been futile. Counsel was therefore not deficient in this regard.

b. Failure To Object To Closing Argument

Harris County Assistant Medical examiner Dr. Marilyn Murr initially concluded that the cause of death was ligature strangulation. She later changed the cause of death to asphyxiation due to strangulation after the prosecutor pointed out certain inconsistencies.

In closing argument, defense counsel stated:

> And then we go to the doctor's testimony, Dr. Murr. Nobody tells me what to do. I believe her. On September 6th, she gave one opinion. On June 2nd, she gave another opinion from the same material that she looked at the first time they did this autopsy.

The same material that was reviewed by another doctor . . . and had the same opinion she had. And yet we come back on June 2nd and we look at that same data and we reach a different conclusion. Or maybe not a different conclusion, but a further conclusion.

What's so important about that? The importance in that is that a ligature strangulation might be interpreted by 12 citizens of this county as being an act clearly dangerous to human life as opposed to the intentional killing of a human being, whereas manual strangulation, choking somebody to death, is clearly an act of intent. That is the difference between the two.

I don't know what you make about her changing her mind. All I know is here it is a month before trial and we come up with a completely different opinion from the same data with no formal second opinion. And when questioned about, well, don't you think it would be good to get another opinion, particularly when you're changing your mind? I don't need one. Well, wasn't that the policy before? Yeah, it was the policy. Aren't two heads better than one? Of course they are. Depends on the head.

Well, Dr. Bellas' 17 years, that's a pretty good head to me. He's her boss. Don't you think particularly if you're changing your mind, that would be the best time, the time you really need somebody else to step in and say, hey, take a look at this? What do you think?

> Didn't happen, folks. What does it mean to you?

20 Tr. at 290-91. In response, the prosecutor argued:

> [Counsel] suggests there is something kind of nebulous about her changing her opinion. I don't think there is any question in any mind in this jury box she wouldn't change the cause of death for me. I wouldn't ask it and God knows she's not about to do something like that.

20 Tr. at 305-06. Ayestas argues that counsel was ineffective for failing to object to this statement because it amounted to the prosecutor testifying and commenting on facts outside the record.

Under Texas law, a prosecutor may present argument to the jury on four types of issues: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) responses to opposing counsel's argument; and (4) pleas for law enforcement. *Moody v. State*, 827 S.W.2d 875, 894 (Tex.Crim.App.), *cert. denied sub nom. Moody v Texas*, 506 U.S. 839 (1992). The state habeas court found that the prosecutor's comments were a permissible response to defense counsel's argument. SH at 660, 667. This conclusion is reasonable and is entitled to deference under the AEDPA.

c. Failure To Object To Vienna Convention Violation

The Vienna Convention is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. Per Article 36, the treaty requires an arresting government to notify a foreign national of his right to contact his consul.

United States v. Jimenez-Nava, 243 F.3d 192, 195 (5th Cir. 2001). Ayestas claims that the arresting authorities never informed him of his right to contact his consulate, and that counsel was ineffective for failing to raise this issue.

Assuming that counsel was deficient for failing to raise an objection, Ayestas nonetheless fails to demonstrate any prejudice. Ayestas contends that the consulate might have helped him procure evidence and witnesses, including his family's presence at trial. As discussed above, however, trial counsel did seek consular assistance in obtaining evidence and witnesses once Ayestas removed his prohibition on counsel contacting his family. The record establishes that Ayestas himself delayed counsel's work in seeking this evidence. Once counsel could contact Ayestas's family members, they did not cooperate. Ayestas thus fails to demonstrate any prejudice flowing from counsel's alleged ineffectiveness.

B. Future Dangerousness

Ayestas raises two claims concerning the future dangerousness special issue. First, he contends that the evidence was insufficient to support the jury's finding that he poses a future danger to society. Second, he contends that predictions of future dangerousness are so inherently unreliable that the special issue is unconstitutional. Because Ayestas never raised the second claim in state court, it is unexhausted and procedurally defaulted.

Ayestas did raise a claim in state court that the evidence was insufficient to support the jury's finding, but he based his argument on state law; he did not cite any provision of the United States

Constitution or other federal law, cited no federal case law, and did not otherwise alert the Texas Court of Criminal Appeal to the federal constitutional nature of the claim. *See* Appellant's Brief at Pgs. 33-36. The Supreme Court has stated that, not only must a petitioner present the state court with his claim, he must also alert the state court of the constitutional nature of the claims. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."). Because Ayestas did not alert the state court to the federal nature of his claim, this claim is also unexhausted and procedurally defaulted. Moreover, even if Ayestas has preserved this claim, it would not entitle him to habeas relief because the conclusion of the Texas Court of Criminal Appeals that the evidence was sufficient to support the jury's finding of future dangerousness was not contrary to and did not involve an unreasonable application of federal law.

C. Jury Unanimity

Ayestas was charged with capital murder for murdering Paneque in the course of committing or attempting to commit robbery, burglary, or both. Ayestas contends that the trial court violated his right to due process by not requiring jury unanimity on which underlying crime he committed. Ayestas never presented this claim to the Texas state courts, however, and it is therefore unexhausted and procedurally defaulted.

D. Vienna Convention

Ayestas next claims that his conviction is unconstitutional because the arresting authorities violated his rights under the Vienna Convention by failing to notify him of his right to contact his consulate. Ayestas presented this claim in his state habeas petition. The TCCA found that the claim was procedurally defaulted because Ayestas did not raise an objection at trial based on the alleged violation of his Vienna Convention rights. SH at 667. Because this finding of default is based on an independent and adequate state ground, i.e., Texas's contemporaneous objection rule, this Court cannot review Ayestas's Vienna Convention claim. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731-32(1991).

E. Burden Of Proof In Mitigation Special Issue

Ayestas next argues that the mitigation special issue unconstitutionally places the burden on the defendant to prove that there are mitigating circumstances sufficient to warrant imposition of a life sentence rather than a death sentence. This claim has no merit.

> The Supreme Court has recognized a distinction between facts in aggravation of punishment and facts in mitigation. . . . If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the

> defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

Apprendi v. New Jersey, 530 U.S. 466, 491 n.16 (2000). The Supreme Court has thus drawn a critical distinction between aggravating and mitigating circumstances in sentencing proceedings. To the extent that some aggravating circumstance is required before the court may exceed an otherwise-prescribed sentencing range, the State must prove those aggravating circumstances beyond a reasonable doubt. Under the Texas capital sentencing statute the statutory maximum sentence in the absence of proof of aggravating circumstances is life imprisonment. A court cannot sentence a defendant to death unless the State proves beyond a reasonable doubt that there is a probability that the defendant will commit future acts of violence constituting a continuing threat to society, and that he acted with the requisite mental state. Once the State has proven these two factors, the defendant may be sentenced to death. The sentencing scheme, however, gives a defendant another opportunity to show that death should not be imposed, even though the State has met its burden of proof. The mitigation special issue is, in this sense, analogous to an affirmative defense. *Apprendi* does not prohibit placing the burden of proof on this special issue on the defendant. The mitigation special issue does not address a factor necessary to increase the

maximum sentence; rather, it addresses factors that allow the jury to impose a sentence *less than* the statutory maximum. Ayestas is not entitled to relief on this claim.

F. Consideration Of Evidence In Connection With Mitigation Special Issue

Ayestas next argues that the mitigation special issue unconstitutionally limits the evidence the jury can consider. Ayestas contends that, by limiting the jury to consideration of evidence that in some way reduces Ayestas's blameworthiness, the special issue only allows the jury to consider evidence with some nexus to the crime. This, he argues, did not allow the jury to give full consideration to his evidence, specifically the letters from his prison English teacher stating that Ayestas was learning English and was a good student. The record does not support Ayestas's claim.

In *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), a plurality of the Supreme Court held "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . as a basis for a sentence less than death." 438 U.S. at 604 (emphasis in original). This holding is based on the plurality's conclusion that death "is so profoundly different from all other penalties" as to render "an individualized decision . . . essential in capital cases." *Id.* at 605. In *Penry v. Johnson*, 532 U.S. 782 (2001), the Supreme Court clarified that a capital sentencing jury must "be able to consider and *give effect to* a defendant's mitigating evidence in imposing sentence." *Id.* at 797 (internal quotation marks, citation and brackets omitted). In

Penry's trial, the jury was told to determine whether the evidence supported a finding on any of three statutory special issues. It was then told that it must consider mitigating evidence and, if it concluded that the weight of the mitigating evidence dictated in favor of a life sentence, it should answer "no" to one of the special issues. *Id.* at 789-90.

The Supreme Court found that there were two plausible interpretations of the instructions given to Penry's jury. First, it could be understood as instructing the jurors to weigh the mitigating evidence in determining its answer to each special issue. *Id.* at 798. The Court held, however, that none of the special issues were broad enough for the jury to give mitigating effect to the evidence of Penry's retardation and the abuse he suffered as a child. *Id.* For example, the jury could fully credit the mitigating evidence, believe it required a sentence less than death, but find that Penry's retardation actually made him *more dangerous* in the future, thereby compelling a positive answer to the future dangerousness special issue. The Court found that a second plausible interpretation was that the jury could simply nullify, i.e., give a negative answer to a special issue which it actually found was supported by the evidence. *Id.* The Court found that this interpretation made the jury instructions "internally contradictory, and placed law-abiding jurors in an impossible situation." *Id.* The Court therefore concluded that the instructions injected an element of capriciousness into the sentencing decision. *Id.* at 800.

In contrast, Ayestas's jury was instructed:

> Do you find from the evidence, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Carlos Manuel Ayestas, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

SH at 778. Petitioner's jury received a separate special issue that specifically allowed it to return a life sentence if it found that the mitigating evidence so dictated. The jury thus had *two* opportunities to act on the mitigating evidence of Petitioner's character, as reflected in the letters from his teacher: First, as a factor weighing against an affirmative finding on the future dangerousness special issue; and second, as free standing mitigating evidence to be weighed in its own right in determining sentence. There was no express or implied requirement of a nexus between the mitigating evidence and the crime. *Cf. Tennard v. Dretke*, 542 U.S. 274, 285 (2004). Nothing in the instructions given to the jury precluded the jurors from giving full weight to any of the mitigating evidence. The instructions were proper and did not violate Petitioner's rights under the United States Constitution.

G. Failure To Inform The Jury Of The Effect Of A Single "No" Vote

In his final claim for relief, Ayestas argues that the Texas capital sentencing scheme is unconstitutional because it fails to inform the jurors of the effect of a single "no" vote on a special issue

No. 3, the mitigation issue. Although Respondent argues that Ayestas did not present this claim to the Texas state courts, it appears that he did present it as his tenth point of error on direct appeal.

Petitioner argues that Texas Code of Criminal Procedure art. 37.071, which requires a jury instruction informing the jury that it must have at least 10 "yes" votes to answer the mitigation special issue "yes" violates the Eighth Amendment. Petitioner argues that this misleads the individual jurors into thinking that they cannot return a life sentence unless at least ten jurors agree on an answer to the special issue.

In *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Supreme Court held that capital sentencing schemes requiring the jury to unanimously find the existence of any mitigating factor before giving that factor any weight violated the Eighth Amendment. The Court held that each juror must be free to give any mitigating evidence any weight that juror deems appropriate in weighing mitigating against aggravating evidence. The Texas statute complies with that requirement. *See McKoy*, 494 U.S. at 442-43.

While the trial court in this case informed the jury that it could not affirmatively find that the mitigating evidence was sufficient to warrant a life sentence unless at least 10 jurors agreed, it never instructed the jury that any particular number of jurors had to agree that any particular piece of evidence was mitigating. In other words, even if only one juror felt that a specific piece of evidence was mitigating, that juror could give the evidence

any weight he deemed appropriate. The instruction only stated that at least 10 jurors, individually weighing mitigating evidence, had to agree that there was sufficient mitigating evidence to impose a life sentence. This instruction does not suffer from the constitutional flaw underlying *Mills* and *McKoy*.

To the extent that Ayestas argues that the jury was misled as to the effect of a single "no" vote, the Supreme Court has held that there is no constitutional requirement of an instruction on the effect of a deadlock. *See Jones v. United States*, 527 U.S. 373, 381-82 (1999).

IV. Certificate of Appealability

Although Ayestas has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does").

A COA may issue only if the petitioner has made a "substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "[Tlhe determination of whether a COA should issue must be made by viewing the petitioner's arguments

through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

The court has carefully considered each of Ayestas's claims and concludes that each of the claims is foreclosed by clear, binding precedent. The court concludes that under such precedents Ayestas has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court therefore concludes that Ayestas is not entitled to a certificate of appealability on his claims.

V. Petitioner's Motion to Expand Record

Petitioner has filed a motion to expand the record to add two affidavits in support of his claim that trial counsel rendered ineffective assistance. (Docket Entry No. 16) The Court has concluded that the Texas courts reasonably found that counsel did not render deficient performance. Because the affidavits do nothing to change that conclusion, the affidavits are unnecessary to the resolution of this case. Accordingly, Petitioner's Motion To Expand Record will be denied.

VI. Motion for the Appointment of an Investigator

On January 25, 2011, Ayestas filed a motion for funding to hire an investigator to develop further evidence about his background in support of his *Wiggins* claim. Federal law provides that "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues

relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant[.]" 18 U.S.C.A. § 3599(f). Neither the Supreme Court nor the Fifth Circuit has defined the phrase "reasonably necessary" beyond the statute's plain language. The Fifth Circuit, however, requires a petitioner to show "that he ha[s] a substantial need" for investigative or expert assistance. *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000); *see also Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir.), *cert. denied*, 522 U.S. 963 (1997) ("In light of the statutory language, we first note that Fuller did not show a substantial need for expert assistance."). The Fifth Circuit upholds the denial of funding "when a petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought after assistance would only supplement prior evidence." *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005); *see also Woodward v. Epps*, 580 F.3d 318, 334 (5th Cir. 2009), *cert. denied*, 130 S.Ct. 2093 (2010).

Title 28, section 2254(d)(2) of the United States Code prohibits a federal court from granting habeas corpus relief

> with respect to any claim that was adjudicated on the merits in State court . . . unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As discussed above, the Texas courts' conclusion that counsel did not render deficient performance was reasonable. Moreover, the evidence Ayestas now seeks would merely supplement the evidence he presented to the state habeas court. Because Ayestas is not entitled to relief on this claim, investigative services are not reasonably necessary. Accordingly, Ayestas's motion (Docket Entry No. 18) will be denied.

VII. Conclusion and Order

For the foregoing reasons, it is **ORDERED** as follows:

1. Respondent Rick Thaler's Motion for Summary Judgment (Document No. 11) is **GRANTED**;

2. Petitioner Carlos Ayestas's Petition for a Writ of Habeas Corpus (Document No. 1) is in all respects **DENIED** and Ayestas's Petition is **DISMISSED WITH PREJUDICE**; and

3. No Certificate of Appealability shall issue in this case.

4. Petitioner's Motion to Expand Record (Docket Entry No. 16) is **DENIED**.

5. Petitioner's Motion for the Appointment of an Investigator (Docket Entry No. 18) is **DENIED**.

SIGNED at Houston, Texas, on this the 26th day of January, 2011.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX AA

CARLOS AYESTAS, Petitioner, v. RICK THALER, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	CIVIL ACTION NO. H-09-2999

FINAL JUDGMENT

For the reasons set forth in the Court's Memorandum Opinion And Order granting respondent Rick Thaler's motion for summary judgment this action is **DISMISSED WITH PREJUDICE**. Because petitioner Ayestas has not made a substantial showing of the denial of a constitutional right, no certificate of appealability shall issue.

This is a **FINAL JUDGMENT**.

SIGNED this 26th day of January, 2011, at Houston, Texas.

/s/ Sim Lake
Sim Lake
United States District Judge

APPENDIX BB

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CARLOS AYESTAS, Petitioner,	§	
v.	§	
RICK THALER, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§	CIVIL ACTION NO. H-09-2999

Order Denying Petitioner's Motion To Alter Or Amend Judgment

On January 26, 2011, this Court entered judgment for the respondent and dismissed Petitioner Carlos Manuel Ayestas's petition for a writ of habeas corpus with prejudice. On February 23, 2011, Ayestas filed a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e) (Docket Entry 21).

A motion to alter or amend under Fed.R.Civ.P. 59(e) "must clearly establish either a manifest error of law or must present newly discovered evidence." *Schiller v. Physicians Resource Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (internal quotation marks omitted). "Relief under Rule 59(e) is also appropriate where there has been an intervening change in controlling law." *Id.* Ayestas fails to demonstrate grounds for relief.

Ayestas cites no new evidence or change in controlling law. While Ayestas vociferously disagrees with this Court's interpretation of controlling law and application of that law to the facts of this case, including this Court's conclusion that Ayestas is not entitled to a certificate of appealability, such disagreement does not clearly establish manifest error and Ayestas is not entitled to relief. Moreover, because this Court's finding that Ayestas has not demonstrated manifest error is not debatable among jurists of reason, Ayestas is not entitled to a certificate of appealability from this Order. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). Accordingly,

IT IS ORDERED that Petitioner's Motion To Alter Or Amend Judgment (Docket Entry 21) is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED.

SIGNED this 28th day of February, 2011, at Houston, Texas.

/s/ Sim Lake
Sim Lake
United States District Judge

APPENDIX CC

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11-70004

FILED
February 22, 2012
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-2999

BEFORE DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

A Texas jury sentenced Carlos Manuel Ayestas to death for a murder he committed during a home robbery. The Texas Court of Criminal Appeals affirmed. That court also denied his application for habeas corpus. Ayestas then applied for a writ of

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

habeas corpus from the United States District Court for the Southern District of Texas. It, too, was denied. Ayestas now seeks a certificate of appealability ("COA") from this court on four issues. We DENY the COA.

FACTS

On September 5, 1995, Carlos Manuel Ayestas and two other men entered into the Houston, Texas home of Santiaga Paneque, to commit a robbery. Paneque was killed during the robbery. Her son later discovered her body lying in a pool of blood on the floor of the master bathroom. She had been bound with the cord of a clock as well as by duct tape. Duct tape had also been placed over her eyes and around her neck. The wounds on her face resulted from a severe beating. The autopsy showed that she had numerous fractures as well as internal hemorrhaging. These injuries were inflicted prior to death. While they were serious, none were fatal. Rather, Paneque was killed by strangulation.

The roll of duct tape used to bind Paneque was found at the scene. Ayestas's fingerprints were on the roll and also on the pieces of tape which were used to bind Paneque's ankles.

A few weeks later, while in Kenner, Louisiana, Ayestas confided to another man that he had killed a woman in Houston in the course of a robbery earlier that month. Ayestas sought the man's assistance in killing his two accomplices because he feared they would say too much. If the man did not help, Ayestas said he would kill him as well. To make his point, he brandished a machine gun.

After Ayestas went to sleep, the man called the

police. Ayestas was arrested and in time returned to Texas for prosecution.

Ayestas was indicted for capital murder and convicted after a jury trial. At the punishment stage, Texas presented evidence that, three days after Paneque's murder, Ayestas and two other men burglarized a hotel room. Ayestas, armed with a machine gun, forced the two occupants into the bathroom and threatened to kill them. After one of the men begged for his life, Ayestas decided not to murder them. He warned the men that if either called the police, Ayestas would kill their families. Ayestas introduced into evidence three letters from the English teacher at the Harris County Jail stating he was a serious, well-behaved student who had no history of committing violent crimes.

The jury determined that Ayestas would likely commit future violent crimes. He was sentenced to death.

Ayestas appealed to the Texas Court of Criminal Appeals. That court affirmed both his conviction and his sentence. He then filed an application for habeas corpus with that court. It was denied.

Ayestas then applied for a writ of habeas corpus from the United States District Court for the Southern District of Texas. *See* 28 U.S.C. § 2254. He alleged he received ineffective assistance of counsel, the evidence was insufficient to convict, the jury instructions were unconstitutional, his rights under the Vienna Convention were violated, and multiple portions of the trial violated his Fourteenth Amendment right to due process.

The district court denied Ayestas's petition. It

also refused to grant a COA. Before this court, Ayestas requestes a COA on the following issues. (1) His counsel was ineffective by failing to investigate mitigating evidence and not preparing for trial in a timely manner. (2) His Sixth, Eighth, and Fourteenth Amendment rights were violated when the police did not inform him of his rights under the Vienna Convention and his counsel failed to object to this fact at trial. (3) He received ineffective assistance when his trial counsel did not object to the dismissal of certain prospective jury members and this failure led to a constitutionally infirm trial. (4) He should be allowed to return to state court to exhaust certain claims.

DISCUSSION

To obtain a certificate of appealability, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That showing is made if "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Our review is distinct from a ruling on the merits of the applicant's claims. It "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at 336. This court does not have jurisdiction to resolve the merits unless a certificate of appealability is granted. *Id.* at 342. In a capital case, "any doubts as to whether a COA should issue must be resolved in the petitioner's favor." *Mitchell v. Epps*, 641 F.3d 134, 142 (5th Cir. 2011) (quotation marks and citation omitted).

These examinations must be made through AEDPA's deferential lens. *Reed v. Quarterman*, 504 F.3d 465, 471 (5th Cir. 2007). Federal habeas relief is permitted only if "the state court's adjudication on the merits (1) 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States' or (2) 'resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" *Rocha v. Thaler*, 619 F.3d 387, 393 (5th Cir. 2010) (quoting 28 U.S.C. § 2254(d)), *cert. denied*, 132 S. Ct. 397 (2011). Any factual determinations made by the state court are "presumed to be correct" and the applicant can overcome this presumption only "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

1. Ineffective Assistance of Counsel in Failing to Investigate

Ayestas argues that his counsel was ineffective during the punishment phase. Generally, to prove a violation of the Sixth Amendment right to counsel, a defendant must show his counsel's representation fell below "prevailing professional norms," and that there is a reasonable probability prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Under the usual circumstances of direct review, it is "strongly presumed" that counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quotation marks and citation omitted). "To overcome that presumption, a

defendant must show that counsel failed to act reasonably considering all the circumstances." *Id.* (quotation marks and citation omitted).

A counsel's decision to limit any investigation is permissible "to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "[S]crutiny of a counsel's performance must be highly deferential" and "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quotation marks and citation omitted).

In addition to proving the unreasonableness of the representation, a petitioner must prove prejudice. *Strickland*, 466 U.S. at 692. The prejudice must be of the kind there is a "substantial, not just conceivable," likelihood of a different result. *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011). That is, after independently reviewing the evidence for and against aggravation presented at trial and before the state habeas court, "there is a reasonable probability that, absent the errors, the jury would have answered the mitigation issue differently." *Ex Parte Gonzales*, 204 S.W.3d. 391, 394 (Tex. Crim. App. 2006).

Because of AEDPA, when the court is asked to review a state habeas court's decision regarding the effectiveness of trial counsel, its review is "doubly deferential." *Druery v. Thaler*, 647 F.3d 535, 538-39 (5th Cir. 2011) (quotation marks and citation omitted). To obtain a COA, a petitioner must show

that it was "necessarily unreasonable for the [state court] to conclude: (1) that he had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the jury's sentence of death." *Cullen*, 131 S. Ct. at 1403. Therefore, in the AEDPA context, this court does not ask whether the trial counsel's conduct was sufficiently deficient. Rather, the correct question is whether the state habeas court's decision that the attorney was constitutionally adequate was objectively unreasonable. *Amos v. Thornton*, 646 F.3d 199, 204-05 (5th Cir.), *cert. denied*, 132 S. Ct. 773 (2011). Because an incorrect application of federal law is not by itself unreasonable, *Pape v. Thaler*, 645 F.3d 281, 287 (5th Cir. 2011), *cert. denied*, 2012 WL 117632 (Jan. 17, 2012), relief may be granted only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 131 S. Ct. at 786.

For a COA, we are limited to deciding whether jurists of reason would find the answers to these questions debatable or whether the issues deserve encouragement to proceed. *Mitchell*, 641 F.3d at 142.

Ayestas claims that his counsel was ineffective by waiting until shortly before trial to investigate whether mitigating evidence might exist which could be used during the trial's punishment phase. In support of his argument, Ayestas relies on the ABA 1989 Death Penalty Guidelines. Those guidelines provide that investigations regarding the punishment phase of a capital trial "should begin immediately upon counsel's entry into the case and

should be pursued expeditiously." ABA 1989 Guidelines, Guideline 11.4.1.A. An investigation should occur "regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence." *Id.* Guideline 11.4.1.C. He stresses the immediacy required by the Guidelines.

He asserts that his trial counsel failed to follow the Guidelines by not investigating possible mitigating evidence until days before trial. Texas disputes this factual assertion, arguing that defense counsel diligently investigated mitigating evidence long before the eve of trial and would have done more but for Ayestas's refusal to cooperate.

The ABA Guidelines do not control our assessment. The Supreme Court has explained that "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (quotation marks and citation omitted). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Premo v. Moore*, 131 S. Ct. 733, 740 (2011) (quoting *Strickland*, 466 U.S. at 690). We look for guidance about the norms in the relevant state as they existed at the time of the trial. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Ayestas cites cases from other circuits, but he fails to identify any authority that explains the professional norms of the Texas bar.

The Guidelines are helpful only if they "reflect

prevailing norms of practice." *Van Hook*, 130 S. Ct. at 17 n.1 (quotation marks and citation omitted). The Guidelines also "must not be so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* (quotation marks and citation omitted). Whether a counsel's decisions are legitimate will depend on the circumstances. *Id.* at 16. We now turn to the circumstances of this case.

The state habeas court found that before trial, Ayestas repeatedly told his attorney that he did not want his family in Honduras to be contacted. After the jury was selected, Ayestas changed his mind. Once Ayestas relented, the state habeas court determined that his counsel acted diligently. She employed an investigator and sought the assistance of the American Embassy in Honduras. According to the state court, "Ayestas's sister stated there were reasons the family would have difficulty leaving Honduras for the applicant's trial, including their father's illness, economic reasons, and their father's murder of a neighbor." The totality of the circumstances led the state court to conclude that Ayestas's trial counsel was not ineffective.

Ayestas argues that the state court decision conflicts with two Supreme Court cases, *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 130 S. Ct. 447 (2009). In *Rompilla*, the Court held that counsel was ineffective for failing to review the state's file regarding the defendant's prior conviction. 545 U.S. at 383-84. This file was important because the state had indicated that it planned to use the defendant's past conviction as

evidence of his violent character. *Id.* at 383. Counsel reviewed a part of the file only after being warned twice by the state that it would present a portion of the transcript of the prior victim's testimony. *Id.* at 384. Once counsel retrieved the file, he only reviewed her testimony. He "apparently examined none of the other material in the file." *Id.* at 385. Counsel's efforts were unreasonable: the file was readily available, concerned a crime similar to the one charged, and counsel knew the state would review the file for aggravating evidence. *See id.* at 389.

Here, Ayestas complains of counsel's failure to investigate and interview persons in Honduras regarding his childhood and lack of a criminal record. His counsel's task was much more arduous than simply reviewing a "file sitting in the trial courthouse, open for the asking." *Id.* She was delayed in beginning the effort by Ayestas's own conduct.

Ayestas also refers us to a case in which a jury sentenced to death a decorated Korean War veteran who suffered from post-traumatic stress disorder, was mildly retarded, and had been beaten severely throughout his childhood by his father. *Porter*, 130 S. Ct. at 448-49. Although his counsel noted these "other handicaps," the mitigating evidence introduced at trial consisted of inconsistent testimony regarding Porter's behavior while intoxicated and that he and his son had a good relationship. *Id.* at 449. His counsel failed to introduce additional evidence because the counsel had only a brief meeting with Porter, failed to obtain any of Porter's school, medical, or military records,

and did not interview any members of his family. *Id.* at 453. The Court held that the counsel's conduct was unreasonable because "counsel did not even take the first step of interviewing witnesses or requesting records." *Id.* It did not matter that Porter had asked that his ex-wife and son not be interviewed – he did not forbid speaking with anyone else. *Id.* The trial counsel's conduct was objectively unreasonable because he failed "to conduct *some* sort of mitigation investigation." *Id.*

Unlike in *Porter*, the trial counsel here requested documents from the state and interviewed numerous persons regarding the mitigation phase of trial.

AEDPA provides relief "if the state court (1) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and reaches an opposite result." *Simmons v. Epps*, 654 F.3d 526, 534 (5th Cir. 2011) (quotation marks and citation omitted).

We considered a related claim by a state prisoner who alleged ineffective assistance because his counsel failed "to hire an investigator or contact and interview witnesses for trial including [the prisoner's] family members about testifying at the punishment phases of the trial." *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004). That argument failed because before trial the prisoner had instructed his attorney not to contact his family or hire an investigator. *Id.* at 635, 639. He could not claim after-the-fact that his counsel was ineffective for following his instructions. *Id.* at 639. "Under Fifth Circuit case law, 'when a defendant blocks his

attorney's efforts to defend him, including forbidding his attorney from interviewing his family members for purposes of soliciting their testimony as mitigating evidence during the punishment phase of the trial, he cannot later claim ineffective assistance of counsel.'" *Sonnier v. Quarterman*, 476 F.3d 349, 362 (5th Cir. 2007) (quoting *Roberts*, 356 F.3d at 638).

As noted, we do not ourselves decide whether Ayestas received ineffective assistance of counsel. AEDPA requires this court to ask "whether it is possible fairminded jurists could disagree" that the state court's decision conflicts with Supreme Court precedent. *Richter*, 131 S. Ct. at 786. If the answer to that question is yes, federal habeas relief is unavailable. *Id.* The state court supported its conclusions with citations to Texas precedent for instances where similar representation was found to not be ineffective. "A state court must be granted deference and latitude" to determine whether the counsel's conduct fell below the Sixth Amendment's floor. *Id.* at 785. Due to the leeway AEDPA provides, our general review shows that "it is not debatable that the state court's resolution of this issue was not unreasonable." *Druery*, 647 F.3d at 540.

2. *Ayestas's Rights Under the Vienna Convention*

Ayestas argues that his constitutional rights were violated because he was never told of the protections afforded to him by Article 36 of the Vienna Convention. *See Vienna Convention on Consular Relations*, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. This argument was not made at

trial. For this reason, the state habeas court held it was procedurally defaulted. Usually, a federal court may not entertain a claim when the state court did not address it due to the prisoner's failure to comply with a state procedural requirement so long as the court's determination was based upon "independent and adequate state procedural grounds." *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (quotation marks and citation omitted). The Texas contemporaneous objection rule is a procedural requirement that serves as an independent and adequate ground. *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005).

Ayestas argues that, notwithstanding his default, he should be allowed to pursue the claim because cause for the default exists due to his trial counsel's ineffectiveness. This prejudiced him because, had the Honduran Consulate been notified sooner, "it would have been in a better position to lend support."

His claim is not debatable among jurists of reason nor does it deserve encouragement to proceed. To prove ineffective assistance, he must show that his counsel's performance was unreasonable and that he was thereby prejudiced. *Druery*, 647 F.3d at 538. He cannot prove either because this Article of the Vienna Convention "does not create individually-enforceable rights." *Rocha*, 619 F.3d at 407. Because any objection would have been futile, his counsel's failure to object was neither unreasonable nor prejudicial. *See Meanes v. Johnson*, 138 F.3d 1007, 1011-12 (5th Cir. 1998). Additionally, he does not show prejudice because he fails to claim that the Honduran consulate would

have provided any support. He simply contends that it would have been in a better position to be supportive had it been informed. He invites this court to speculate whether the consulate would have acted in specific ways. We decline to do so. His request for a COA on this issue is denied.

3. Dismissal of Prospective Jurors

Ayestas claims the *voir dire* was inadequate and that he received ineffective assistance of counsel when his counsel did not object to the dismissal of prospective jurors who were disinclined to impose the death penalty. This alleged error, he argues, led to a jury prone to sentence him to death.

A prospective juror may be excused for cause "if their views on capital punishment would prevent or substantially impair the performance of their duties in accordance with the instruction and oath." *United States v. Fields*, 483 F.3d 313, 357 (5th Cir. 2007) (quotation marks and citation omitted). For example, it is proper to strike a venire member who states he "could never, regardless of the facts and circumstances, return a verdict which resulted in the death penalty." *Id.* It is also proper to strike a member who, in response to being asked whether she could vote for death under any circumstances answers, "No, I don't think so." *Williams v. Collins*, 16 F.3d 626, 632-33 (5th Cir. 1994).

The state habeas court found that the trial court individually questioned each member of the venire and "elicited information that they would not impose the death penalty under any circumstances." The state court held that this approach "did not lessen the State's burden [to strike a potential juror] for cause and that the State's burden was met through

the responses elicited by the trial court during voir dire examination." Ayestas has failed to rebut these findings with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Ayestas also argues that his counsel should have further questioned the venire members. We do not find that failure to be improper. Once prospective jurors have indicated during general *voir dire* that they would not impose the death penalty under any circumstances, further questioning is not required. *See Ortiz v. Quarterman*, 504 F.3d 492, 503 (5th Cir. 2007). A COA will not issue.

4. Unexhausted Claims

Before the district court, Ayestas requested a stay and abeyance so that he could return to state court to pursue admittedly unexhausted claims. A "stay and abeyance should be available only in limited circumstances." *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Courts should be cautious about granting these motions as they "undermine[] AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition." *Id.* A district court's denial of a stay and abeyance is reviewed for abuse of discretion. *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir.), *cert. denied*, 131 S. Ct. 506 (2010).

When an applicant for a writ of habeas corpus brings an unexhausted claim in federal court, as Ayestas has done here, "stay and abeyance is appropriate when the district court finds that there was good cause for the failure to exhaust the claim; the claim is not plainly meritless; and there is no indication that the failure was for purposes of delay."

Id.

Ayestas fails to show good cause. His position is premised on the belief that his state habeas counsel failed to raise certain claims. Assuming his allegation to be true, it is nonetheless insufficient. Generally, errors by "habeas counsel cannot provide cause for a procedural default." *Cantu v. Thaler*, 632 F.3d 157, 166 (5th Cir. 2011) (quotation marks and citation omitted).

Further, any claim is meritless because it is procedurally barred. *See Williams*, 602 F.3d at 309. With only a few exceptions, Texas bans subsequent habeas petitions. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a). The exceptions clause requires a prisoner to prove the factual or legal basis for his current claims was unavailable when he filed his previous petition and that "the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex Parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Ayestas has failed to allege that the factual and legal basis for his claim was unavailable when he filed his previous petition. Rather, he asserts that a better attorney would have pressed the claims. Such a statement is a tacit admission that the claims he now seeks to exhaust could have been advanced in his previous state habeas proceeding. Therefore, his unexhausted claims are procedurally barred. That Ayestas has not shown that the district court abused its discretion by denying the motion for stay and abeyance is beyond reasonable debate.

Ayestas's motion for a certificate of appealability is DENIED.

APPENDIX DD

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11-70004

FILED
July 11, 2012
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-2999

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

IT IS ORDERED that the petition for rehearing is DENIED.

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Petitioner has also moved that this court vacate its prior opinion and remand to the district court for consideration of his previously made claim of ineffective assistance of state habeas counsel in light of the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). This court recently addressed *Martinez*'s applicability in Texas. *See Ibarra v. Thaler*, No. 11-70031, 2012 WL 2620520, at *4 (5th Cir. June 28, 2012). We held that, because Texas does not mandate ineffective assistance claims to be brought first in habeas proceedings, *Martinez* does not apply in Texas. *Id.* Accordingly, we DENY the motion.

APPENDIX EE

(ORDER LIST: 569 U.S.)

MONDAY, JUNE 3, 2013

CERTIORARI - SUMMARY DISPOSITIONS

* * *

12-6656	AYESTAS, CARLOS M. V. THALER, DIR., TX DCJ
12-6760	HAYNES, ANTHONY C. V. THALER, DIR., TX DCJ

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Trevino v. Thaler*, 569 U.S. ___ (2013).

APPENDIX FF

SUPREME COURT OF THE UNITED STATES

***No.* 12-6656**

CARLOS MANUEL AYESTAS,
Petitioner

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
Respondent

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Trevino v. Thaler*, 569 U.S. ___ (2013).

June 3, 2013

A True copy, WILLIAM K. SUTER
Clerk of the Supreme Court of the United States

By: /s/ Cynthia Rapp

APPENDIX GG

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11-70004

FILED
January 30, 2014
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-2999

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BEFORE DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

A Texas jury sentenced Carlos Manuel Ayestas to death for a murder he committed during a home robbery. His conviction was affirmed by the Texas Court of Criminal Appeals, which also denied his application for habeas corpus. Ayestas subsequently sought federal habeas relief. In his federal application, Ayestas raised additional claims of ineffective assistance of counsel not raised in his state habeas application. Ayestas conceded these claims were unexhausted and requested a stay so that he could return to state court to exhaust the claims. On January 26, 2011, the district court denied the motion for a stay, concluding the unexhausted claims were procedurally barred because the Texas Court of Criminal Appeals would apply its bar to successive petitions and refuse to consider the new evidence on the merits. The district court also denied his application for a certificate of appealability ("COA").

On February 22, 2012, we also denied Ayestas's motion for a COA on the issue of the stay, concluding that Ayestas had failed to show good cause for failure to exhaust the claim and that any claim would be meritless because it would be procedurally barred by Texas law banning subsequent habeas petitions. To the extent Ayestas had argued a better attorney would have raised the claims in state court, we concluded that, generally, errors by "habeas counsel cannot provide cause for a procedural default." *See Cantu v. Thaler*, 632 F.3d 157, 166 (5th Cir. 2011), *cert. granted, judgment vacated*, 132 S. Ct. 1791 (2012). Accordingly, we denied COA on the district court's denial of Ayestas's motion for stay and abeyance.

In March 2012, Ayestas filed a motion to vacate our judgment and remand to the district court in light of the Supreme Court's holding in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Martinez* created a limited exception to the rule that the ineffectiveness of habeas counsel could not provide cause for procedural default. We denied Ayestas's motion to vacate and remand in reliance on one of this court's decisions that *Martinez* categorically does not apply to claims from Texas inmates. *See Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012), *overruled by Trevino v. Thaler*, 133 S. Ct. 1911 (2013). On June 3, 2013, the Supreme Court granted Ayestas's petition for writ of certiorari, vacated our judgment, and remanded for further consideration in light of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

In light of the Supreme Court's order, we GRANT Ayestas's motion to vacate our prior decision denying Ayestas's application for a COA. We REMAND to the district court to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*. We express no view on what decisions the district court should make on remand.

APPENDIX HH

STATE OF NEVADA §
§
COUNTY OF CLARK §

AFFIDAVIT OF TENA FRANCIS

1. My name is Tena Francis. I am an investigator employed by the Law Office of the Federal Public Defender, District of Nevada. Prior to holding this position, I ran a private investigations firm in Texas. We specialized in capital case defense at both the pretrial and post-conviction stages. In total, I have twenty-seven years of experience in the field of capital case defense.

2. In January/February 1998, I was contacted by Gary Hart to conduct a post-conviction investigation for Carlos Manuel Ayestas. At the time, Gerald Bierbaum, who had considerable investigative experience in capital cases, was working for me as an investigator. Though Mr. Hart retained my investigation firm, the work of investigating the case was assigned to Mr. Bierbaum.

3. In 1996, shortly after the new post-conviction framework for capital cases, as set out in Article 11.071 of the Texas Code of Criminal Procedure, went into effect, Mr. Hart and Robin Norris left their employment as staff attorneys on the Court of Criminal Appeals and formed a law partnership primarily devoted to representing death-sentenced individuals in their state post-conviction proceedings. They accepted at least ten cases initially and continued to accept additional cases in the years after leaving the

court. Mr. Ayestas's case was one of those later appointments. Mr. Hart and Mr. Norris retained me to work on many of these cases, including Mr. Ayestas's case.

4. At the time, the Court of Criminal Appeals paid appointed attorneys under the 11.071 framework very little -- amounts that were hardly sufficient compensation to attorneys, considering the amount of work these cases required—and it provided very little funding for ancillary services, such as investigation and expert assistance. At least initially, I believe that Mr. Hart and Mr. Norris envisioned being able to work within these monetary constraints by limiting investigation and by raising mostly record-based claims.

5. Furthermore, it was my experience in working with Mr. Hart and Mr. Norris on many of their initial 10 cases that they were not interested in investigating mitigation evidence or in fully developing evidence related to the punishment phase. While this was true of Mr. Hart initially, over time he developed a better understanding of the value of a comprehensive mitigation investigation in post-conviction proceedings. However, at the time he worked on Mr. Ayestas's case, it is possible Mr. Hart was not as concerned about conducting a comprehensive mitigation investigation in his cases and he did not seek adequate funding for them.

6. As a result of these circumstances, I typically developed what I considered to be comprehensive, but preliminary, investigation plans that detailed the need for a complete mitigation investigation.

One of the purposes of the investigation plans was to urge Mr. Hart and Mr. Norris to conduct a complete investigation, which included potential punishment issues and to document this fact in the files. A second purpose was to arm the attorneys with the ammunition needed to convince their judge that adequate funding was required in order for them to effectively represent their clients.

7. I developed a preliminary investigation plan in this case at Mr. Hart's request. Mr. Hart provided limited information about the case; my recollection is that the only thing he gave me was his notes from reading the trial record. I made an effort to formulate a fairly detailed investigation plan, which covered topics in both the guilt-innocence and the punishment phases of the case based on this limited information. The investigation plan in this case lacked details in some areas simply because I had so little information on which to base a list of specific things to do. I informed Mr. Hart, via the preliminary investigation plan, that more tasks would likely be added as the investigation got underway.

8. I knew that the jury had heard virtually no mitigation evidence concerning Mr. Ayestas's background and life history, and I knew he was raised in Honduras. I also knew that Mr. Ayestas's trial counsel had compiled no bio-psycho-social history of Mr. Ayestas. Based on this and my experience in other cases, I knew there was a definite post-conviction issue relating to trial counsels' inefficient representation and

their failure to investigate mitigation issues at all. I advised Mr. Hart of this, via the investigation plan, in the following manner:

> "The jury heard nothing about this defendant's: family, real character, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological trauma he suffered, etc. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history of the client."

9. I advised Mr. Hart that a competent social history would have to be comprehensive and include extensive document collection as well as numerous witness interviews with virtually everyone who knew Mr. Ayestas -- from Honduras, to California, Mexico, and Houston -- in order to "detail every aspect of the client's life . . . ." With respect to witness interviews, I advised Mr. Hart to "include [not only] the client and close members of his family, but also persons who are/were in a position to be more objective about the client and his surroundings." Mr. Hart and I went through the same process of developing a plan for the investigation in each of the cases we worked together and I know he understood from our past experiences there was an absolute necessity to conduct a comprehensive mitigation investigation. I estimated that the investigation of mitigation issues alone would take up to 200 hours. This was likely a very conservative estimate given that the

investigation would cross both state and national boundaries.

10. Even with the little information Mr. Hart provided me, it was clear there were issues to be developed that could have been used to defend against the charges and the aggravators, as well as to mitigate punishment for Mr. Ayestas. There was clear indication that Mr. Ayestas was addicted to drugs. Drug use would have impacted his ability to form the culpable mental state of premeditation and deliberation required for a conviction of first degree murder. Additionally, drug use would have inhibited the ability of Mr. Ayestas to refrain from violent behavior, a fact that could have been used as mitigation during the punishment phase of his trial. There were many issues related to his addiction that needed to be investigated. For example, because there is a genetic component to addiction, a background investigation of Mr. Ayestas' family was necessary, including witness interviews and records collection related to addiction issues. This is relevant to mitigating the client's punishment in many ways, For example, in a situation where there is a family history of addiction, Fetal Alcohol Spectrum Disorder is a possibility for the client. At the time of our work on behalf of Mr. Ayestas, it was well-established that drug addiction changes the brain in fundamental ways and results in devastating injury to the parts of the brain that regulate behavior. The subjects of drug addiction and the neuropathology of drug use were presented at many seminars I attended during

the late 1990's, at least one of which I know Mr. Hart attended.

11. There is a high rate of comorbidity between substance and abuse and mental illness. In some cases, drug use brings about the symptoms of a mental illness. In other cases, drug addiction begins as a means by the drug user to self-medicate symptoms of mental illness. A comprehensive investigation into the bio-psycho-social history of Mr. Ayestas was warranted in order to explore the issues related to addiction and mental health.

12. Prior to our work on the Ayestas case, I had worked with Mr. Hart on cases where mental illness was a mitigating factor. On more than one case, my firm developed more mitigation evidence to be used for the client's post-conviction filings. On this case, however, Mr. Hart did not follow my advice to conduct a comprehensive investigation. Though he interviewed Mr. Ayestas's mother and two sisters who were in Houston, this fell well short of the type of investigation I recommended and the type of investigation we had done in past cases we worked together.

Further Affiant sayeth not.

/s/ Tena Francis
Tena Francis

SWORN TO and SUBSCRIBED before me, the undersigned authority, on the 16 day of June, 2014, by Tena Francis, Las Vegas, Nevada.

STATE OF NV
COUNTY OF CLARK

/s/ Tiffani D. Hurst
Notary Public
State of Nevada
Tiffani D. Hurst

My commission expires:
3-15-2016

APPENDIX II

**IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION**

CARLOS MANUEL AYESTAS, a/k/a Dennis Humberto Zelaya Corea,	§	
Petitioner,	§	
	§	**USDC No. 4:09-cv-2999**
v.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division,	§	**Capital Case**
Respondent.	§	

PETITIONER'S MOTION FOR FUNDING FOR ANCILLARY SERVICES IN ACCORDANCE WITH 18 U.S.C. § 3599(f)

NOW COMES, Petitioner, Dennis Humberto Zelaya Corea ("Mr. Zelaya"), under the name Carlos Manuel Ayestas, in accordance with 18 U.S.C. § 3599(f), and requests funding in the amount of $20,016 for a mitigation investigator to assist his counsel in efforts to demonstrate cause and prejudice under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), to prove his entitlement to relief on the underlying ineffective assistance of trial counsel ("IATC") claims, and to

obtain any other relief that may be available to him. As outlined below, the mitigation expert's services "are reasonably necessary for the representation of the defendant." *See* 18 U.S.C. § 3599(f).

I. Introduction

Mr. Zelaya raised a number of IATC claims in his original habeas petition before this Court. Though state habeas counsel raised an IATC claim that complained primarily that trial counsel failed to secure the attendance of his mother and two sisters as witnesses at the punishment phase of his death penalty trial, counsel failed to raise a fully-developed claim alleging that trial counsel failed to investigate, in the comprehensive manner required by prevailing professional norms, Mr. Zelaya's social, medical, and psychological history (commonly called a *Wiggins*[1] claim). In particular, state habeas counsel failed to investigate Mr. Zelaya's history of drug and alcohol abuse and mental health issues. Though Mr. Zelaya presented a more traditional *Wiggins* failure to investigate claim, this Court agreed with the respondent that the "new evidence" rendered the claim unexhausted and, thus, procedurally barred. *Memorandum Opinion and Order*, at 11-16 (DE 19). The Fifth Circuit affirmed. *Ayestas v. Thaler*, No. 11-70004, slip op. at 13 (5th Cir., Feb. 22, 2012).

In the wake of this decision, the Supreme Court of the United States decided *Martinez*; however, the Fifth Circuit refused to vacate and remand based on the teachings in that case. Mr. Zelaya sought certiorari review in the Supreme Court, and the Court, after declaring in *Trevino* that *Martinez*

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[1] *Wiggins v. Smith*, 539 U.S. 510 (2003).

applies in Texas cases, granted Mr. Zelaya's petition for writ of certiorari, vacated the Fifth Circuit's judgment, and remanded to that court to consider the impact of *Martinez* and *Trevino* on this case. *Ayestas v. Thaler*, 133 S. Ct. 2764 (2013). After allowing the parties to brief the issue, the Fifth Circuit, in turn, vacated and remanded to this Court for the same consideration. *Ayestas v. Stephens*, 533 Fed. Appx. 422 (5th Cir. 2014).

The parties have submitted briefing on the effect of *Martinez* and *Trevino* to this Court. Mr. Zelaya argued that the cases open a pathway in which he can excuse the default this Court found and, thus, lead to *de novo* merits review of the full *Wiggins* claim. He requested that the Court first enter a schedule in which investigation, discovery, and supplemental briefing can occur, and then, ultimately, determine whether a hearing is warranted. Mr. Zelaya files this request for funding in order to conduct the comprehensive investigation that is warranted and reasonably necessary for him to show that he is entitled to relief.

II. Request for Funding Under 18 U.S.C. § 3599(f)

A. Mr. Zelaya has a statutory right under 18 U.S.C. § 3599(f) to the provision of ancillary services in order to conduct an investigation to establish cause and prejudice for default and to establish the merits of his underlying IAC claims.

The federal habeas statute authorizes the district courts to grant funds for investigative and other expert services in the course of federal post-conviction litigation. 18 U.S.C. § 3599(f). In

McFarland v. Scott, 512 U.S. 849 (1994), a case addressing the statutory right to federal post-conviction counsel under the predecessor funding provision, the Supreme Court of the United States explained that, in addition to counsel, "[t]he services of investigators and other experts may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *Id.* at 855. "[E]stablished habeas corpus and death penalty precedent suggests that Congress intended to provide prisoners with 'all resources needed to discover, plead, develop, and present evidence determinative of their "colorable" constitutional claims . . . [because] [t]he determination of a habeas claim often depends on the full development of factual issues, and experts play an important role in the fact-finding process.'" *Patrick v. Johnson*, 48 F. Supp. 2d 645, 646 (N.D. Tex. 1999) (citation omitted). The standard for providing investigative or expert assistance is whether such assistance is "reasonably necessary." 18 U.S.C. § 3599(f) ("Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant . . ."). *See also Fuller v. Johnson* 114 F.3d 491, 502 (5th Cir. 1997) (addressing requirements of predecessor funding statute 21 U.S.C. § 848(q)).

Though courts in the Fifth Circuit have routinely rejected funding to investigate defaulted IATC claims because any such efforts would be futile given that federal review was unavailable no matter what

evidence was developed, *see Smith v. Dretke*, 422 F.3d 269, 288-89 (5th Cir. 2005); *Riley v. Dretke*, 362 F.3d 302, 307-08 (5th Cir. 2004); *Fuller v. Johnson*, 114 F.3d at 502, *Martinez* and *Trevino* have undermined this underlying basis for denying such requests. Because ineffective assistance of state habeas counsel may now excuse the default and in turn lead to merits review of the underlying IATC claims, a petitioner may now show funding not only to be reasonably necessary, but in fact indispensable in the development of the factual basis of the relevant issues. *See Patterson v. Johnson*, 3:99-CV-0808-G, 2000 WL 1234661, at *2 (N.D. Tex., Aug. 31, 2000) (not designated for publication) (holding that investigative services are generally reasonably necessary in order to establish the factual predicate needed to prove cause and prejudice).

B. Prevailing standards of practice require having a mitigation specialist as part of the defense team and these standards apply at all stages of capital litigation, including state and federal post-conviction proceedings.

Prevailing professional norms require that a defense team have a mitigation specialist at all stages in capital litigation, which includes federal post-conviction proceedings. The Texas Guidelines and Standards for Texas Capital Counsel sets out the comprehensive nature of the investigation required of post-conviction counsel and admonishes that counsel may not rely the previously compiled record and must conduct a full and independent investigation. *See* STATE BAR OF TEXAS: 2006 GUIDELINES AND STANDARDS FOR TEXAS CAPITAL

COUNSEL, Guideline 12.2.B.1.b.[2] Importantly, counsel should seek the services of a trained mitigation specialist. *Id.* at Guideline 12.2.B.5.c. Correspondingly, counsel is strongly discouraged from relying upon "his or her own observations of the capital client's mental status," and must seek to include at least one person on the defense team, typically the mitigation specialist, who is "qualified to screen for mental or psychological disorders or defects and recommend further investigation of the client if necessary." *Id.* at Guideline 12.2.B.5.b. The mitigation specialist must have the ability to

> (i.) compile a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation, interviews, and collection of documents; (ii.) analyze the significance of the information in terms of impact on development, including effect on personality and behavior; (iii.) find mitigating themes in the client's life history; (iv.) identify the need for assistance from mental health experts; (v.) assist in locating appropriate experts; (vi.) provide social history information to experts to enable them to conduct competent and reliable evaluations; and (vii.) work with the defense team and experts to develop a comprehensive and cohesive case in mitigation that could have been presented at trial.

Id. at Guideline 12.2.B.5.c. The investigation required is exhaustive and probes every aspect of the

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[2] The Texas Guidelines can be found at the following website address: www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/TexasCapital Guidelines.pdf.

client's life and background, including medical history, family and social history, experience of traumatic events and exposure to criminal violence, educational history, military history, and prior juvenile and adult criminal history. *Id.* at Guideline 12.2.B.5.d. Document collection and witness interviews are comprehensive and require considerable effort and time to perform. *Id.* at Guideline 12.2.B.5.f. & g. Habeas counsel is required to "locate and interview the capital client's family members . . . , and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors," and so forth. *Id.*

The ABA Guidelines are in accord with the Texas Guidelines and similarly detail the comprehensive investigation that is required and the fact that a trained mitigation specialist is essential to that end. *See* 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.7 (reprinted in 31 HOFSTRA L. REV. 913 (2003)) (setting out the investigation requirements and requiring use of a mitigation specialist as essential to the efforts). Mitigation specialists are a required and essential component of any capital defense team, and those without one fail to meet the requisite standard of care owed to their clients. *See id.* at Guideline 4.1.A (requiring at least two attorneys, an investigator, and a mitigation specialist).[3] As a result, "[t]he

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[3] *See also* Sean D. O'Brien, *When Life Depends On It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 708-12 (2008) ("Even the most skilled capital defense

defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history." *See* 2008 ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1.B (reprinted in 36 Hofstra L. Rev. 677, 689-90 (2008)). Furthermore, "[m]itigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information." *Id.* at Guideline 5.1.C. Importantly, a mitigation specialist must be a skilled interviewer "who can recognize and elicit information about mental health signs and symptoms...." *Id.* This is particularly important in developing evidence that can later be used by a mental health professional in providing expert assistance. *Id.* at Guideline 5.1.E (noting the specialized training required "in identifying, documenting and interpreting symptoms of mental and behavioral impairment...."). *See generally* Richard G. Dudley, Jr., & Pamela Blume Leonard, *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008) [hereinafter *Getting it Right*]. Additionally, a mitigation specialist must be able to

> establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of

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attorneys need the assistance of a mitigation specialist; capital defense is simply too large a task.").

> sensitive information and to assist the client with the emotional impact of such disclosures.

Id. at Guideline 5.1.C. Finally, mitigation specialists must "possess the knowledge and skills to obtain all relevant records pertaining to the client and others." *Id.* at Guideline 5.1.F. In other words, the mitigation specialist possesses important skills that few attorneys have.

> C. In counsel's opinion, it is necessary to retain a mitigation specialist to conduct a thorough punishment phase investigation and to assist counsel in locating necessary experts, in developing and framing referral questions, and in compiling the documents necessary to provide to the expert.

As elaborated upon extensively in his post-*Martinez/Trevino* briefing, Mr. Zelaya has accumulated significant evidence demonstrating that his state habeas counsel performed deficiently, failing to heed his investigator's advice to conduct a thorough and comprehensive investigation, particularly into documented areas that revealed Mr. Zelaya had a history of drug and alcohol abuse and suspected mental illness or impairments. Rather counsel limited himself to his own brief interviews with Mr. Zelaya's mother, Zoila, and his two sisters, Xiomara and Blanca. He proposed raising a claim that trial counsel failed to secure their attendance at trial, though he expressed doubts that this claim would garner much favor from the trial court or the Court of Criminal Appeals. Moreover, he failed to request funding to conduct the needed investigation. Instead, he let the matter go altogether, notwithstanding the presence of red flags

that any reasonable attorney would have pursued. Even after it became apparent that Mr. Zelaya was in fact mentally ill, having been diagnosed with schizophrenia, counsel continued to do nothing.

Moreover, Mr. Zelaya has presented evidence that trial counsel knew about many of the same leads that Mr. Zelaya abused drugs and alcohol and was potentially mentally impaired, having suffered numerous head injuries, but like state habeas counsel, she did nothing to investigate these matters. Additionally, Mr. Zelaya has presented evidence that tends to undermine trial counsel's explanation for her greatly delayed investigatory efforts (that Mr. Zelaya told her not to contact his family in Honduras and only relented shortly before trial). In fact, counsel did very little preparation on any aspect of the case until shortly before jury selection began, which included her attempts to contact Mr. Zelaya's family in Honduras. Tellingly, even these efforts preceded Mr. Zelaya's so-called "permission" to investigate. Simply put, counsel waited until the last minute to prepare for this case, regardless of Mr. Zelaya's instructions.

Finally, trial counsel presented virtually no mitigation evidence at trial. Even the good character evidence state habeas counsel developed, which has been greatly expanded in the federal proceedings (including with witnesses who did not fall under Mr. Zelaya's alleged instruction to trial counsel not to contact), would have given the jury at least something to show Mr. Zelaya was not the purely evil person the prosecution made him out to be. But assuming Mr. Zelaya is able to develop evidence of his drug and alcohol abuse and that he

suffered from a deteriorating mental state because of the onset of schizophrenia in the prodromal phase of the disease, there is an even greater likelihood that he will be able to show a reasonable probability of a different result under *Strickland*.[4]

The fact that this case is on remand from the Supreme Court and the Fifth Circuit should not matter to whether funding is warranted. The efforts of building a mitigation case do not cease with the filing of a petition and continue throughout the federal litigation.[5] This is particularly true in this case, because as demonstrated in Mr. Zeyala's briefing on remand, he will likely be entitled to an evidentiary hearing in order to establish cause and prejudice under *Martinez* and *Trevino* and entitlement to relief on his underlying IATC claims. Thus, it is necessary to retain a mitigation specialist.

Counsel has located a qualified investigator, Nicole VanToorn, who is available to undertake the proposed investigation into mitigation. Ms. VanToorn is qualified under the Texas and ABA Guidelines, and her assistance to the defense team would be invaluable. Ms. VanToorn has 15 years of experience as a mitigation specialist, and she has conducted investigations in approximately 25 capital

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[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

[5] *See generally* Eric M. Freedman, *Introduction: Re-Stating the Standard of Practice for Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 664 (2008) ("[T]he task of imagining, collecting, and presenting what is generally called 'mitigation' evidence pervades the responsibilities of defense counsel from the moment of detention on potentially capital charges to the instant of execution.").

cases. She has a degree in Criminal Justice and has attended numerous conferences and seminars related to mitigation investigation. She has worked at various public defenders offices at both the state and federal level and is a licensed private investigator in California and Texas.

Ms. VanToorn has worked on this case in an investigatory role previously and based on her investigative results and the other documentation accumulated in this case, she has provided an extensively detailed investigation plan, which is attached to this motion as Appendix "A," and is incorporated in this motion as if fully set forth. The average mitigation investigation usually requires hundreds of hours to review and analyze existing records, formulate an efficient and effective investigation plan, and locate witnesses to be interviewed. In this case, some of the work has been accomplished through the investigatory efforts undertaken pre-petition, during the pendency of the case in this Court, and during the pendency of the case while it was on appeal; however, as demonstrated in Ms. VanToorn's investigation plan, much remains to be done. Particularly, investigations in Mexico, California, Texas, and Louisiana remain to be done, and much document collection is either pending or needs to be done.

Mr. Zelaya has been diagnosed with schizophrenia.[6] Additionally, he has a documented

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[6] Federal post-conviction team consulted with REDACTED, Ph.D., a preeminent psychologist who specializes in schizophrenia and has testified in a number of high-profile death penalty cases. Dr. REDACTED volunteered some time to assist in assessing the significance of the diagnosis and to

history of drug and alcohol abuse. He left his home in Honduras abruptly when he was 18 years old and traveled to the United States on four occasions. He travelled through Mexico on his journeys to the United States, and he stayed for extended periods in Guadalajara, Mexico. For the most part, he settled in Long Beach, California. His spiral into drug and alcohol dependency occurred there. Moreover, as detailed in Ms. VanToorn's investigation plan and in Mr. Zelaya's briefing on remand to this Court, schizophrenia most typically manifests after a

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identify potential lines of inquiry for a proposed investigation. He essentially reviewed the documents attached to the *Petitioner's Brief on Remand* documenting Mr. Zelaya's diagnosis of schizophrenia, which are attached to the brief as Exhibits "W," "X," and "Y." Dr. REDACTED believed that the diagnosis was both significant and that there was a need for a comprehensive investigation. Dr. REDACTED explained that with schizophrenia, the illness typically progresses for many years prior to a diagnosis. More importantly, just because a person has not yet been diagnosed with schizophrenia does not mean that the person is not severely mentally ill. The prodromal and premorbid phases of schizophrenia, which precede the psychotic episode and the final diagnosis, are typically characterized by impairments, sometimes severe, in the person's judgment, perception, and ability to function. Dr. REDACTED indicated that it was not unusual, given that most schizophrenics exhibit anosogosia, that Mr. Zelaya would not report any significant history of mental illness. Dr. REDACTED also thought that Mr. Zelaya possibly exhibited perseverative thinking, in which Mr. Zelaya latches onto a thought or idea and will not let it go regardless of how unreasonable it is or how much others dissuade him that it reflects reality, which could be symptomatic of schizophrenia and could have existed in the prodromal phase. It could also explain why Mr. Zelaya was a challenging client to the trial team. With Dr. REDACTED assistance, Mr. Zelaya's defense has been able to hone the investigation plan being presented as part of this motion.

person is at least 18 years of age and most likely during the early to mid 20s. In most cases, it is characterized by (1) a long prodromal phase (insidious onset) in which a person's mental functioning can be severely impaired and (2) anosogosia, in which the afflicted person is incapable of knowing he is mentally ill. Mr. Zelaya lived in California after he turned 18 years old and lived there during his 20s. He encountered many people there, he lived with a girlfriend and fathered a son with her, and he entered the California penal system. Additionally, Ms. VanToorn developed evidence from people in Honduras who knew Mr. Zelaya during this timeframe that indicates his functioning may have been impaired or was deteriorating. Thus, at this point in the investigation, evidentiary indications point to California and Mexico as the next logical phase for the investigation. Mr. Zelaya therefore requests that the Court fund an investigation into his history of mental illness and drug and alcohol abuse as they may have developed and manifested themselves to those around him while in California and Mexico.

Ms. VanToorn will attempt to complete this phase of the investigation in 160 hours, though more time may be required. Her hourly rate is $100/hour, which is consistent with what mitigation specialists in the area charge for this type of work. She will review the documents collected to date, update or revise investigation plan as needed, prepare a documents list and issue needed records requests, locate and interview witnesses, prepare memoranda detailing the results of her interviews and investigation, consult with counsel, and secure affidavits from witnesses as needed.

Additionally, Ms. VanToorn will be invaluable to the defense team as the case progresses. She can assist counsel in locating a qualified expert witness, compiling documents for the expert to use, and formulating referral questions for the expert. Finally, she can assist counsel in preparing for an evidentiary hearing on the claims that require resolution of material and disputed issues of fact. It is counsel's opinion that the requested assistance is reasonably necessary to develop the needed facts in order to establish the underlying merits of the IATC claims and that the default of those underlying claims is excused under *Martinez* and *Trevino*. Ms. VanToorn's primary role will be to investigate mitigation evidence and evidence demonstrating trial counsel's deficient performance in order to support the *Wiggins* claim, which alleged that trial counsel failed to investigate mitigation evidence in a timely and comprehensive manner.

In all likelihood, it will be necessary for the defense to retain a psychologist or psychiatrist, such as Dr. REDACTED, to assist the defense. However, it is first necessary to accumulate the evidence as proposed in Ms. VanToorn's investigation plan. *See Getting it Right*, at 974-75 ("As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment until the life history investigation is complete."). *See also id.* at 975 ("In capital litigation, an accurate and reliable life history investigation is the foundation for developing and presenting pivotal mental health issues."). This is particularly true because any expert retained in this case will be expected to review historical data and render an

opinion concerning its significance concerning Mr. Zelaya's past mental functioning.

Under 18 U.S.C. § 3599(g)(2), fees for "investigative, expert, and other reasonably necessary services" are presumptively capped at $7,500, "unless payment in excess of that limit is certified by [this Court] . . . as necessary to provide fair compensation for services of an unusual character or duration . . . ." *Id.* Moreover, the "amount of the excess payment" must be "approved by the chief judge of the circuit." Obviously, the amount requested in this motion, and the amount ultimately that will be required to investigation this case fully, will exceed this amount. The circumstances in this case clearly demonstrate a need for services of "an unusual character or duration." No attorney prior to current counsel has undertaken the sort of investigation this case requires; thus, there is no prior record upon which an investigation can be built. Instead, the investigation must begin from the beginning. It touches two central American countries and three States. This distance alone reveals the unusual nature of the investigation. The number of witnesses that have been identified numbers in the dozens. But more importantly, this case involves extraordinarily complex investigatory tasks to piece together the manifestations of Mr. Zelaya's mental illness in the years leading up to the commission of this crime. This will require identifying percipient witnesses, probing their memories for clues whether Mr. Zelaya manifested signs of mental illness and the nature of his ability to function, and developing evidence that a psychologist or psychiatrist could determine whether Mr. Zelaya was mentally ill

during this time. It will encompass complex cultural issues that must be addressed and accounted for. It will also require extensive document collection.

At this point in the investigation, Mr. Zelaya is seeking only funding to continue the investigation in California and Mexico, because the indications from past investigation reveal that this may be the most productive. Once this evidence is developed, Mr. Zelaya can then seek additional needed funding for investigation and expert assistance, which will be based upon the results of the presently proposed investigation and the investigation that has preceded it to date. In turn, the Court will have additional evidence upon which it can determine whether further investigation beyond that requested in this motion, qualifies under (g)(2) because of its unusual character or duration.

WHEREFORE, PREMISES CONSIDERED, Mr. Zelaya respectfully requests that this Court authorize the requested funding as reasonably necessary under 18 U.S.C. § 3599(f) in the amount of $20,016. Mr. Zelaya also requests any and all other relief to which he may be entitled.

Respectfully submitted,

* * *

/s/ Paul E. Mansur
Attorneys for Petitioner

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

CARLOS MANUEL AYESTAS, a/k/a Dennis Humberto Zelaya Corea,	§	
Petitioner,	§	
	§	**USDC No. 4:09-cv-2999**
v.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division,	§	**Capital Case**
Respondent.	§	

ORDER

Before the Court is Petitioner Carlos Manuel Ayestas's Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f).

WHEREFORE all things considered, the Motion is **GRANTED**.

The Court finds that Mr. Zelaya has demonstrated that the funds in the amount of $20,016 for an investigation are reasonably necessary under the circumstances of this case. Moreover, because of the unusual character and duration of the proposed investigation, the Court approves excess funds under 18 U.S.C. § 3599(g)(2). The Court recommends that the Chief Judge of the

Fifth Circuit approve the fees and expenses set forth in the motion.

ORDERED this _____ day of _____, 2014

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UNITED STATES DISTRICT JUDGE

* * *

APPENDIX "A"

Proposed Investigation Plan Submitted by Nicole VanToorn

* * *

MEMORANDUM

TO: Paul E. Mansur & Ben Wolff

FROM: Nicole VanToorn

DATE: November 3, 2014

RE: *Carlos Manuel Ayestas v. William Stephens*, Cause No. 4:09-cv-2999

Investigation plan for California and Mexico portions of the mitigation investigation; estimates of costs and expenses.

The defense team in the above referenced case has requested that I provide a detailed investigation plan for the continued mitigation investigation—specifically the portions of the investigation to be conducted in Long Beach, California, and surrounding areas and in Guadalajara, Mexico. The following is a description of the mitigation investigation conducted to date, an explanation of the need for further investigation, and an estimate of the costs and expenses to conduct the proposed investigation.

I am a private investigator and mitigation specialist. I have worked as a mitigation specialist for some 15 years and have participated in that capacity in more than 25 capital murder trial and post-conviction investigations. I was a mitigation specialist with the Capital Habeas Unit, Office of the

Federal Public Defender, in Las Vegas Nevada. In 2013, I relocated to Fort Worth, Texas, and I work as a mitigation specialist under the name VanToorn Investigations. Prior to my work in capital mitigation investigations, I worked as a criminal investigator for various defender offices in California and Missouri. I hold a Bachelor's degree in Justice Systems and a Master's degree in Business Administration. I have attended many annual conferences and seminars as part of my training, including federal habeas corpus conferences, Capital Habeas Unit conferences for Federal Public Defender employees, and conferences sponsored by the National Defender Investigator Association. I am fluent in Spanish. My CV is attached as Exhibit "A," and is incorporated herein as if fully set forth. My CV details my employment and training history as a mitigation specialist.

I am familiar with the client, Dennis Zelaya, who was convicted of capital murder and sentenced to death under the name of Carlos Manuel Ayestas, and with the facts of the case. After relocating to Texas from Nevada, I volunteered to assist Mr. Zelaya's defense team with a mitigation investigation in Honduras; however, because of limited resources, I was only able to spend two weeks in Honduras. Though I interviewed a number of witnesses (including family, both immediate and extended; friends of Mr. Zelaya and of his family; acquaintances; medical providers who treated Mr. Zelaya; a teacher; and his soccer coach) and collected relevant documents in Honduras, the investigation is far from complete. It is my opinion that a complete investigation will require additional document collection and interviewing witnesses we

have identified in Mexico, California, Texas, and Louisiana, particularly given Mr. Zelaya's diagnosis of schizophrenia.[1]

Some background concerning my role in a capital defense team and the nature of a mitigation investigation is necessary to understand why additional investigation is warranted in this case. A mitigation investigator works as part of a team of attorneys, investigators, and other experts in the defense of death penalty case. A mitigation specialist is essential to a capital defense team and is required under the prevailing profession norms, as reflected in the Guidelines and Standards for Texas Capital Counsel and the ABA Death Penalty Guidelines.[2] Mitigation specialists are required at

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[1] The investigation is particularly complex given Mr. Zelaya's diagnosis with schizophrenia. In such a case, the investigator must tailor the investigation to seek out evidence of early manifestations of this debilitating mental illness, particularly in its prodromal and premorbid phases, which precede any psychotic episodes. Thus, particular sensitivity is required to discern limitations or impairments in functioning that could be indicative of schizophrenia. Interviews with percipient witnesses must focus on the behaviors, expressions, demeanor, and beliefs that the client may have exhibited during the relevant time in the years preceding a diagnosis.

[2] *See* 2006 GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL, Guideline 12.2.B.5.b (stating that at least one person, typically a mitigation specialist, must be qualified to screen for mental or psychological disorders or defects and recommend further investigation if necessary"); *id.* at Guideline 12.2.B.5.c (setting out comprehensive duties for mitigation specialist); 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 4.1.A (reprinted in 31 HOFSTRA L. REV. 913 (2003)) (requiring at least two attorneys, an investigator, and a mitigation specialist in every capital proceeding) (hereinafter

every stage of capital proceedings in which a death sentence has been imposed. In post-conviction proceedings in which a complaint has been raised that trial counsel failed to investigate mitigation evidence for use in a punishment defense, this is particularly true, because the post-conviction defense team must conduct the investigation that trial counsel failed to undertake.

A mitigation investigation generally involves a multigenerational inquiry into the biological, psychological, and social influences on the development and adult functioning of the accused. It involves parallel tracks of (1) conducting multiple, in-person, face-to-face interviews and (2) collecting and analyzing life-history records. The fruits of a thorough mitigation investigation not only provide capital defendants with the effective representation to which they are entitled, but they also assure that the decision-maker has a meaningful opportunity to consider all the relevant evidence in making a reasoned moral and legal judgment and that the outcome of the proceedings is reliable and just.

The process of identifying and interviewing life history witnesses is a laborious and time-consuming

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2003 ABD DEATH PENALTY GUIDELINES]; *id.* at Guideline 10.4 (stating capital defense team must have at least one member who is qualified to screen for mental or psychological disorders or impairments); *id.* at Guideline 10.7 & 10.11 (requiring a thorough and comprehensive investigation relating to the penalty phase of a capital trial); 2008 ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1.B.-F (requiring a mitigation specialist and specifying the qualifications, training, skills, and duties of all mitigation specialist) [hereinafter 2008 ABA SUPPLEMENTARY MITIGATION GUIDELINES].

endeavor. Simply, a mitigation investigation cannot be completed in a matter of hours or days, particularly in a case as complex as Mr. Zelaya's, in which he had significant lifetime contact in Honduras, Mexico, California, Texas, and Louisiana. Face-to-face interviews with witnesses are indispensable, and often-times multiple interviews with some witnesses will be required. It takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with life history witnesses to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socio-economic status, religious and cultural practices, the existence of inter-familial abuse, and mentally-ill family members. These inquiries impose upon the darkest and most shameful secrets of the client's family, expose raw nerves, and often cause interviewees to re-experience past trauma. As one set of commentators explained:

> [Life history witnesses] need the time and respect of the mitigation specialist if they are to comprehend the process of a capital trial and the critical nature of life history information. It is common for physical, emotional, and/or sexual trauma in the lives of the client and his family members to come to light during the life history investigations. Revealing trauma can be re-traumatizing and this process must not be rushed or minimized.

Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*,

36 HOFSTRA L. REV. 963, (2008) [hereinafter *Getting it Right*]. Additionally, when addressing a client and family members from a foreign country, as in this case, there are cultural differences that must be addressed.[3] In sum, there are often many barriers to the disclosure of sensitive information, and it is only with time that an experienced mitigation specialist can break down these barriers and obtain accurate and meaningful responses to these sorts of questions. As a result, a comprehensive mitigation investigation typically requires hundreds of hours to complete.

For clients who suffer from mental illness or other psychological impairments, as here, mitigation evidence may explain the succession of facts and circumstances that led to the crime, and how that client's disabilities distorted his judgment, reactions, and overall general functioning. Of all the diverse frailties of humankind, mental illness or impairment is singularly powerful in its ability to explain why individuals from the same family growing up in the same setting turn out differently. It is an objective scientific fact, and it does not reflect a volitional choice made by the client. An accurate medical and

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[3] *See* Scharlette Holdman & Christopher Seeds, *Cultural Competence in Capital Mitigation*, 36 HOFSTRA L. REV. 883, passim (2008); *Getting it Right*, at 967 & n.32. *See also* 2008 SUPPLEMENTARY MITIGATION GUIDELINES, Guideline 5.1(c) ("Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. . . They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information.").

social history is essential to a competent mental health evaluation. Because mentally ill individuals, particularly those suffering from schizophrenia as Mr. Zelaya, by definition are likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client. *See Getting it Right*, at 980. Additional components of a reliable evaluation include a thorough physical examination (including neurological examination) and appropriate diagnostic testing.

For these reasons, it is essential for the mitigation specialist to conduct a thorough social history investigation *before* retaining mental health experts. "As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment of the client until the life history investigation is complete." *Getting it Right*, at 975. In a capital case, a mental health assessment is not simply a matter of rendering a diagnosis; rather it must be integrated into the broader mitigating narrative. *Id.* ("Addressing an acute circumstance and formulating a mitigation narrative are different endeavors."); *see also id.* ("In capital litigation, an accurate and reliable life history investigation is the foundation for developing and presenting pivotal mental health issues."). While in a clinical setting, the diagnosis may be useful for mental health professionals to describe what they observe, in a capital setting, in which a comprehensive understanding of the capital defendant is required, a diagnosis "offers little insight into the cause of the diagnosed condition or the lived experience of the person diagnosed . . . . " *Id.* at 983.

> A deeper understanding of the subject is rendered through a psychodynamic formulation, which takes into account influences in a subject's life that contributed to his mental state, considers how environmental and personality factors are relevant to analyzing the subject's symptoms, and considers how all these influences interacted with the person's genetic, temperamental, and biological makeup.

Id. Until a complete life history investigation is completed, a mental health professional can only render a diagnosis based on incomplete information that is available and cannot place the diagnosis into the entire context of the client's life. *Id.* at 984. Thus, only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kind of culturally competent expert is appropriate to the needs of the case, what role that expert will play, and what referral questions will be asked of the expert. In sum, in order to make informed decisions about the kind of experts that may be needed and the referral questions such experts will address, the defense team first needs a reliable social history investigation. *See, e.g.*, 2008 SUPPLEMENTARY MITIGATION GUIDELINES, Guideline 5.1.

A mitigation investigation also should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational, employment, social service, and court records. The collection of records and analysis of this

documentation involve a slow and time-consuming process. Many government record repositories routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance. Careful review of records often discloses the existence of collateral documentation that, in turn, needs to be pursued. Both the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases emphasize the importance of collecting records containing life-history information. The commentary to ABA Guideline 10.7 states:

> Records-from courts, government agencies, the military, employers can contain a wealth of mitigating evidence documenting or providing clues to childhood abuse, retardation, brain damage, and or mental illness and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children . . . .The collection of corroborating information from multiple sources-a time-consuming task-is important whenever possible to ensure the reliability and this the persuasiveness of the evidence.

2003 ABA DEATH PENALTY GUIDELINES, Guideline 10.7, commentary. Finally, when the original documentation is in Spanish, as much of the documentation obtained to date in this case is, considerable time and resources must be expended to

translate them into English to make them useful to the defense and to the courts.

Prior to my involvement in the case, the federal post-conviction defense team had already begun the process of investigating Mr. Zelaya's social history: they had obtained some social history documents, including TDCJ records; created a comprehensive timeline; obtained affidavits of family members who were in the United States; and created lists of potential witnesses in Honduras to interview and documents to obtain. In addition, they had compiled and digested the trial and habeas records from the state court proceedings, and established a valuable working relationship with the Honduran Government. I was able to review many of these documents, and together, after a day-long investigation strategy meeting, we devised a comprehensive investigation plan for Honduras. Because the witness list was very large, and I only had two weeks in which to interview witnesses, establish critical rapport with them, type affidavits, and then arrange to have them notarized (which in Honduras is a much more difficult task than it is in the United States), it was necessary to prioritize which people I would interview and which of those would receive most of my attention during my time in Honduras.

Before I travelled to Honduras on the mitigation investigation trip, federal habeas defense team compiled considerable evidence of Mr. Zelaya's good character qualities, describing specific instances of Mr. Zelaya's caring nature and helpfulness to others. Though the issue in the state proceedings had been limited to trial counsel's failure to present Mr.

Zelaya's mother and two sisters, Xiomara and Blanca, as witnesses at trial, we knew that there were numerous other witnesses, both inside and outside the family, who could have provided similar information and could have testified about specific, concrete instances of good character. Both Xiomara and Blanca provided affidavits to the federal post-conviction team that expanded on this detail and identified specific witnesses who could provide testimony. *See Affidavit of Xiomara Zelaya, dated December 20, 2010* ¶¶ 36-39) and *Affidavit of Blanca Keller, dated December 20, 2010* ¶¶ 30-35), which are attached as Exhibits "EE" and "FF" to *Petitioner's Brief on Remand from the Fifth Circuit Concerning the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case.* Thus, we knew that these witnesses existed and should be interviewed. I did so and collected affidavits from many of them.

Nevertheless, our investigative goals extended beyond obtaining this previously identified evidence. Because Mr. Zelaya had been diagnosed with schizophrenia, one of our objectives was to seek out evidence of manifestations of mental illness when Mr. Zelaya was in Honduras. Both the DSM-V and the DSM-IV-TR indicate that the flagrant onset of schizophrenia (an acute psychotic episode) typically occurs in the late teens to the early thirties; however, the peak age for the first psychotic episode for males is typically in the mid-20s. *See* Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, at 102 (DSM-V); Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, at 307 (DSM-IV-TR). Moreover, though onset can be abrupt, "the majority of individuals display some type of prodromal phase manifested by

the slow and gradual development of a variety of signs and symptoms." DSM-IV-TR, at 308. Prodromal symptoms may include mild or subthreshhold forms of hallucinations or delusions: individuals may express a variety of unusual or odd beliefs that are not of the delusional proportions; evidence unusual perceptual experiences; their speech may be understandable but vague; their behavior may be unusual but not grossly disorganized; individuals who had been socially active may become withdrawn from previous routines. *See* DSM-V, at 101.

Though Mr. Zelaya left Honduras when he was 18 years old and had limited contact with anyone in Honduras in the years between leaving home for the first time and his arrest in Houston, we sought out witnesses who may have traveled with Mr. Zelaya to the United States or had observed him during this period of time. We also attempted to obtain medical records and to talk to physicians and other medical personnel who may have treated him. Other investigation objectives included exploring the family dynamics and economic situation, Mr. Zelaya's education, evidence related to his birth and early childhood, his work history, and the family's experience with the trial defense team.

In the two weeks that I was in Honduras, I interviewed some two dozen witnesses. I began my investigation in San Pedro Sula. Because it was not safe to venture into many of the neighborhoods where the witnesses lived, Mr. Zelaya's younger sister, Nolvia REDACTED, arranged to have the witnesses brought to a safe location in which I could interview them. I was also assisted by Ms. Flabia

REDACTED, an employee of the Department of Exterior Relations, who acted as my guide during the time I was in Honduras. I was able to visit Mr. Zelaya's schools, the soccer field where he played soccer, and the neighborhoods in which he grew up, and I documented much of this in photographs. I was also able to gather some documentation concerning Mr. Zelaya's life in Honduras. After a little more than a week in San Pedro Sula, I went to the capital city, Tegucigalpa, where I interviewed additional witnesses. Fortunately, I was also able to visit with Mr. Zelaya's father, Francisco REDACTED, who was 85 years old and was living outside Tegucigalpa in Danli. He has since passed away.

With as many witnesses as I ended up interviewing in such a short time, it was hard to establish any sort of rapport, and I had little opportunity to conduct follow up interviews with any of the witnesses.[4] In short, I believe I was only able to gain superficial information from many of the

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[4] During the first few days, I had a hard time getting Nolvia to understand that we had to prioritize our time and focus on witnesses we believed would have the most pertinent information about Mr. Zelaya and his family. Initially, she kept bringing in people who had only tangential contact with the family and who had little to offer as far as mitigation evidence. Also, Nolvia and some of the other family members were concerned about Ms. REDACTED role-they feared government interference with my efforts. It took considerable effort on my part to convince Nolvia that I, along with Mr. Zelaya's attorney, were setting the investigation goals and schedule and that the government was not interfering in any way with our investigation. Once I convinced Nolvia that we should direct the investigation, she became more cooperative and my investigation became more productive.

witnesses. However, with no assurance that I, or any other investigator, would return to Honduras, we decided to obtain affidavits from 13 witnesses. These include:

1. Jose REDACTED - Mr. Zelaya's maternal uncle.
2. Nolvia REDACTED - Mr. Zelaya's younger sister.
3. Ruth REDACTED - Mr. Zelaya's other younger sister.
4. Zoila REDACTED - Mr. Zelaya's mother.
5. Francisco REDACTED - Mr. Zelaya's father.
6. Luis REDACTED - Mr. Zelaya's older half-brother.
7. Mario REDACTED - Mr. Zelaya's cousin.
8. Mauricio REDACTED - Mr. Zelaya's older half-brother.
9. Dilberth REDACTED - Mr. Zelaya's oldest son.
10. Oscar REDACTED - Mr. Zelaya's friend.
11. Jose REDACTED - Mr. Zelaya's soccer coach.
12. Fidel REDACTED - Mr. Zelaya's teacher.
13. Reina REDACTED - a family friend.

Most of these witnesses provided information about Mr. Zelaya's character growing up - he was a good, well-mannered child; he went to school and studied

hard; he worked in the family business; he was a good, obedient son; he had a good reputation in the neighborhood; he was outgoing and had numerous girlfriends. In other words, the witnesses I interviewed, including those who provided affidavits, were able to corroborate all of the assertions made in federal court about Mr. Zelaya's good character qualities and his caring nature to his family and to others.

Though Mr. Zelaya's family described themselves as "middle-class," what I observed in Honduras was primitive by standards in the United States. The family held a higher status in the neighborhood because they owned a small business—essentially a pawn shop or second-hand store; however, they were very poor. Many witnesses described Mr. Zelaya's father as being a strict disciplinarian, but none confirmed that he was abusive. Nevertheless, he had five children with Mr. Zelaya's mother when he was married to another woman, and he split his time between the two families. He also had numerous children with other women. He would often bring his children from other women into the household in which Mr. Zelaya and his sisters lived. Though no one in the family thought this family arrangement was strange, Ms. **REDACTED** informed me that this is not normal for Honduras and cannot be explained by reference to a different culture. After Mr. Zelaya's father murdered a neighbor, he fled to Tegucigalpa and never returned. Thus, though no one reported any physical or sexual abuse, the family did exhibit dysfunction that we have documented.

In state habeas proceedings, trial counsel described Mr. Zelaya's family as unconcerned with his situation and uncaring in general. My interactions with Mr. Zelaya's mother, along with descriptions of her from other witnesses, reveal that she has a reserved demeanor and a passive personality. To someone who had not taken the time to get to know her, she might present as being aloof or uncaring. Furthermore, her cautiousness with strangers could be attributed to cultural factors and distrust of the government, which is common in Honduras. However, she shows tremendous concern for the plight of her son. She and, indeed, the entire family have gone to great lengths to assist him. After learning of the news that Mr. Zelaya was facing capital murder charges and, later, in the wake of his conviction and death sentence, the family has strived to assist him. They put a tremendous amount of pressure on the Honduran government, through their organization, OHPROLIDEZ (an acronym translated as the Honduran Organization Pro Life and Freedom for Zelaya). One of our investigation objectives was to document their efforts in order to rebut trial counsel's assertion, based apparently on a snap judgment, that the family was unwilling to assist the defense. I obtained numerous documents-newspapers, flyers, letters, media reports, and so forth-documenting their efforts.

Not surprisingly, because of the nature of schizophrenia-its typically slow progression through the prodromal phase and its eventual manifestation in an acute episode after a person reaches the age of 18 years-I was unable to develop much evidence relating to Mr. Zelaya's mental health through the

Honduran phase of the investigation. Medical records for Mr. Zelaya and the family had long since been destroyed; so I was unable to collect documentation concerning his medical history. I talked to Dr. James REDACTED, Mr. Zelaya's physician, and to Areceli REDACTED, a nurse. They reported nothing remarkable about Mr. Zelaya's health history, and they knew little about his mental health, which was not unexpected because Mr. Zelaya had left Honduras when he was 18 years old. Other witnesses I interviewed provided similarly sparse evidence. Because of the cultural stigma placed on mental illness in Honduras, it is my belief that it was difficult to get witnesses to discuss it openly, particularly in the brief time I could spend with each witness.

Nevertheless, I was able to uncover promising leads. I located two witnesses who reported suspicious changes in Mr. Zelaya's demeanor and behavior during the post-18 year-old period. Jose REDACTED accompanied Mr. Zelaya to the United States during one of his travels, and they settled in Long Beach, California. Jose stayed in Long Beach with Mr. Zelaya for about two weeks and then continued on to New York. He reported: "During that time, I could see that Dennis had changed a bit. He looked worried and stressed out, but I don't know why . . .." He attributed it to Mr. Zelaya missing his family. Also, Nolvia REDACTED saw Mr. Zelaya when he returned to Honduras after being in the United States. She observed: "When Dennis returned from the United States for the first time, he was very sensitive and was not the same person as a result of what he suffered on the trip; he was very thin." The Affidavits of Jose REDACTED and Nolvia

REDACTED are attached as Exhibits "B" and "C," respectively. I know that in documenting schizophrenia, many witnesses will attribute changes in a family member or a friend to other causes, such as stress, a phase that they are going through, religious experience, or the effects of drug and alcohol use. Though these witnesses may not have recognized that Mr. Zelaya may have been exhibiting signs of mental illness, their observations can be valuable to a psychologist or psychiatrist, later retained, who can then offer a professional viewpoint, not only to these witnesses' recollections and observations, but to the entire evidentiary picture that we develop and can then determine if Mr. Zelaya exhibited signs of mental illness and impaired functioning typical of someone in the prodromal phase of schizophrenia.

It is my belief that we have only scratched the surface in the investigation into Mr. Zelaya's history of significant and debilitating mental illness. Because it is rare for the first acute episode to occur in a person's 30s and is much more common in the 20s, our investigation must determine whether anyone who encountered Mr. Zelaya observed dysfunctional, bizarre, or psychotic behavior. We must seek out evidence concerning whether Mr. Zelaya expressed delusional or disorganized thinking and whether his mental functioning was impaired. This evidence, to the extent it exists, will be found in those places Mr. Zelaya was during the time period after he left Honduras—in other words, Mexico, California, Texas, and Louisiana.

Between 1987 and 1995, Mr. Zelaya traveled to the United States four times. Each time he would

cross Guatemala and Mexico and then enter the United States, typically in California. He was apprehended many times in southern Mexico, in the State of Chiapas, and was deported back to Guatemala. He would immediately return to Mexico in another attempt to cross into the United States. As stated, Mr. Zelaya made it to the United States at least four times during this time period, and he was deported three of those times. He reports that he always used his real name, Dennis Zelaya, with United States immigration authorities. We have made requests for his immigration documents from the United States, and the status of these requests is pending. We still need to make similar requests of Mexican immigration authorities.

Mexico also features prominently in Mr. Zelaya's social history and likely contains clues about the development of Mr. Zelaya's mental illness. Because he traveled the length of the country to get to the United States, Mr. Zelaya typically stayed with a Mexican family in Guadalajara (at a place he referred to as the "casa") each time he passed through Mexico. He would stay here three to four months at a time and would pay for his lodging. Through this contact, Mr. Zelaya met Jesus REDACTED, who was the head of a Jehovah's Witnesses community in Las Aquilas, a colonia of Guadalajara. Mr. Zelaya would sometimes stay with him, rather than have to pay for his lodging at the casa. Mr. Zelaya worked as a gardener when he stayed in Guadalajara. During one journey through Mexico, Mr. Zelaya's cousin, Mario REDACTED, accompanied him, and they stayed with the Jehovah's Witnesses for several months. The Affidavit of Mario REDACTED is attached as

Exhibit "D." When investigating the social history of a client who has been diagnosed with schizophrenia, it is important to talk to clergy—pastors, ministers, priests, and other church workers—who may have interacted with the client and discussed religious topics. These witnesses can be an important source in documenting strange and delusional beliefs indicative of schizophrenia. We also know that when Mr. Zelaya lived in Houston, Texas, he stayed with a church group, attended the church, and had a number of personal interactions with the pastor. This will also be an important investigative objective.

Mr. Zelaya and his family also report that Mr. Zelaya had been held captive for a period of weeks in Mexico by a "coyote" (a term referring to human smugglers who transport immigrants across Mexico and into the United States) until his family paid an additional $1,000 to release him. It is obvious that the human trafficking business is fraught with peril and can cause tremendous stress and suffering to those "customers" who place their lives in the hands of the coyotes. *See* Damien Cave, et al., *A Smuggled Girl's Odyssey of False Promises and Fear*, N.Y. TIMES, Oct. 5, 2014, reprinted at http://nyti.ms/1xfekny. But being held captive can also be a significant stressor that could trigger onset of a mental illness, such as schizophrenia.

Mr. Zelaya settled in Long Beach California, where he stayed with a relative, Wilfredo REDACTED. Mr. Zelaya worked at a car wash, called the Castillo Car Wash that Wilfredo managed, and through this employment, Mr. Zelaya was introduced to a criminal element, particularly other

immigrants who were in the drug trade. Mr. Zelaya started using drugs, particularly cocaine, and drinking alcohol excessively during this time. He was arrested twice—for heroin and cocaine distribution—and he ended up being incarcerated in Tehachapi prison in California for nearly two years. He was deported again after being released. Mr. Zelaya also had a girlfriend, Maria REDACTED, when he lived in Long Beach. She had a son, Dennis REDACTED, through him. In accordance with the ABA Guidelines as well as the Supplementary Guidelines, we have identified a number of potential witnesses who could provide valuable information about Mr. Zelaya—particularly, his mental functioning during this time and his drug and alcohol use:

1. Maria REDACTED (Dennis' girlfriend; mother of Dennis son born in Long Beach)
2. Dennis REDACTED (Dennis' son)
3. Wilfredo REDACTED (Dennis lived and worked with Wilfredo)
4. Kathy (wife of Wilfredo)
5. Carol (sister of Kathy)
6. Wilfredo's Mexican girlfriend (lived with Dennis)
7. Cynthia (daughter of Mexican girlfriend; lived with Dennis)
8. Male (son of Mexican girlfriend; lived with Dennis)
9. Ana REDACTED (Friends of Wilfredo and Dennis)

10. Javier REDACTED (Friends of Wilfredo and Dennis)
11. Omar (El Salvadoran drug dealer)
12. Elsa (Omar's Honduran girlfriend)
13. Isabel (Honduran sister of Elsa; Sahun's girlfriend)
14. Sahun (Honduran drug dealer; doing 25 years in federal prison)
15. Armando (Honduran who worked with Dennis and Wilfredo)
16. Humberto (Honduran who worked with Dennis and Wilfredo)
17. Javier (Honduran who worked with Dennis and Wilfredo)
18. Javier (Mexican who worked with Dennis and Wilfredo)

We have also started making records requests; however, because of the inertia in the California bureaucratic system, many of these requests remain pending:

1. REDACTED Jail/Police records:
   REDACTED
2. Court Records:
   REDACTED
3. DOJ Records:
   REDACTED
4. Prison Records:
   REDACTED

5. Prison Medical Records:
   REDACTED

6. Parole Records:
   REDACTED

These records can provide potentially valuable information about Mr. Zelaya's mental health and his history of drug and alcohol abuse.

As stated, Mr. Zelaya also had many contacts in Houston, Texas, and in Kenner, Louisiana, where he was arrested. A comprehensive investigation will include people who knew him and interacted with him in these places. It will also include identifying and questioning witnesses who interacted with Mr. Zelaya around the time of the crime, during the pretrial and trial periods, and in the post-trial period.

At the present time, based on the investigation to date, particularly with respect to the evidence we uncovered in Honduras, the next phase of the investigation should focus on Mr. Zelaya's time in California and Mexico. Mr. Zelaya lived for many years in California during the period of time in his life when prodromal symptoms of schizophrenia would start to appear. He settled there to live, fathered a child, and eventually was placed into an institutional setting. In Mexico, the investigation will center around Mr. Zelaya's experiences in Guadalajara, where he lived, worked and worshiped on repeated and extended stays. The investigation will also center on his migratory experiences; it is essential to investigate the circumstances under which Mexican smugglers kidnaped and held Mr. Zelaya for ransom, because such a traumatic event may precipitate the development of mental illness.

As such, we must investigate Mr. Zelaya's other Mexican immigration-related experiences to develop a clear picture of the Mr. Zelaya's social history during the prodromal and premorbid phases of schizophrenia. To this end, Mr. Zelaya lived in Villa Hermosa, Tabasco, Comitan, Chiapas, and Mazatlan, Sinaloa for varying periods of time.

To complete a comprehensive investigation in California and Mexico a minimum of 160 hours will be required. I estimate the following time allotment for each task:

1. Travel to Long Beach, California; Tehachapi prison; and the surrounding communities, in order to interview witnesses and collect related documents: 80 hours.
2. Travel to Guadalajara, Mexico, and surrounding communities, in order to interview witnesses and collect related documents: 60 hours.
3. Drafting reports of investigation results for the defense team, team meetings concerning which witnesses to seek affidavits from; drafting affidavits and securing their execution with witnesses; and translating Spanish language affidavits to English: 20 hours.

The customary rate for mitigation specialists in Texas is currently $100.

Proposed Budget For Auxiliary Defense Services

	Out of court hours	Rate	Fees (subtotal)	Expenses	Estimated total fees & expenses
Long Beach, CA[5]	80	$100/ hr	$8,000	$2,740 Hotel: $1,380 (10 nights @ $138/night) Meals and Incidental Expenses: $710 (10 days @ $71/day) Rental car & gas: $650 (10 days @ $65 day) Airfare: $500	$11,240
Other: Report drafting; Team Meetings; Correspondence	20	$100/ hr	$2,000	N/A	$2,000

[5] These are the per diem and expense rates for the Los Angeles, CA metropolitan area, of which Long Beach is part, as determined by the United States General Accounting Office. The rates quoted are those in effect for Fiscal Year 2015. See http://www.gsa.gov/portal/category/100120.

Guadalajara, Mexico, and other parts of Mexico[6]	60	$100/hr	$6,000	$1776 Hotel: $816 (8 nights @ $102/night) Meals and Incidental Expenses: $460 (8 days @ $65/day) Airfare: $500	$7776
				Total:	$20,016

These estimates are not inclusive of all of expenses that will be required, but rather a best estimate.

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[6] Foreign per diem rates for lodging and meals/incidentals are established monthly by the Office of Allowances, U.S. Department of State for the reimbursement of U.S. Government civilians traveling on official business in foreign areas. See http://aoprals.state.gov/content.asp?content_id=184&menu_id=78. The lodging and the meals & incidentals rates quoted by the Office of Allowances for the month of November 2014. While the State Department's Guadalajara's per diem hotel rate is $161/night and the meals/incidentals per diem is $79/day, in the interest of economy, we ask that this court reimburse expenses at the much lower overall Mexico rate.

* * *

EXHIBIT "A"

CV of Nicole VanToorn

THIS DOCUMENT HAS BEEN REDACTED
IN ITS ENTIRETY

* * *

EXHIBIT "B"

Affidavit of Jose REDACTED

* * *

Republica de Honduras

Secretaria De Relaciones Exteriores
De La Republica De Honduras

Apostille Oficial

Convention de la Haye du 5 Octobre 1961

En Honduras el Presente Documento públic ha sido firmado por:

LUCILA CRUZ MENENDEZ

Quien actua en calidad: **SECRETARIA GENERAL**

y lleva sello/ timbre correspondiente a: **CORTE SUPREMA DE JUSTICIA**

Certificado en Tegucigalpa, M.D.C. Honduras, C.A., lunes, 29 de abril de 2013

/s/ Maria Dolores Suazo Suazo
Maria Dolores Suazo Suazo
Asistente de la Secretaria General

* * *

* * *

SECRETARIA DE LA CORTE
SUPREMA DE JUSTICIA
REPUBLICA DE HONDURAS

AUTENTICA No. 5747-13

La Infrascrita, Secretaria de la Corte Suprema de Justicia CERTIFICA:
Que es auténtica la firma que antecede y dice:

ROBERTO CARLOS GUZMAN VARELA
puesta en su caracter de:

NOTARIO

Descripcion:

Quien en Certificado de Autenticidad Serie "C" No. 117623 de fecha 17 de abril de 2013, autentica las firmas de LUIS REDACTED, MARIO REDACTED, JOSE REDACTED, OSCAR REDACTED, JOSE REDACTED, NOLVIA REDACTED, RUTH REDACTED y ZOILA REDACTED, puestas en la misma fecha en las DECLARACIONES a favor de DENNIS HUMBERTO ZELAYA COREA.- Documentos para realizar trámites en Estados Unidos de América.

* * *

/s/ Lucila Cruz Menendez
Lucila Cruz Menendez
Secretaria General

Colegio de Abogados de Honduras
Certificado de Autenticidad

El infrascrito, Notario, **ROBERTO CARLOS GUZMAN VARELA**, con domicilio en la ciudad de Tegucigalpa, Municipio del Distrito Central, y en tránsito por esta ciudad de San Pedro Sula Departamento de Cortes, inscrito con registro de la Honorable Corte Suprema de Justicia Numero mil cuatrocientos dieciocho (1418) e inscrito en el Ilustre Colegio de Abogados de Honduras con carnet numero tres mil ochocientos ochenta y ocho (3888). Con oficina profesional en la Residencial Palma Real, bloque k, casa 82, Comayagüela, Municipio del Distrito Central, **CERTIFICA**: Que las fermas que calzan en los documentos denominados Declaraciones de fecha diecisiete de abril del presente año y que corresponden a: 1) LUIS REDACTED, con cedula de identidad número REDACTED; 2) MARIO REDACTED, con cedula de identidad número REDACTED, 3) JOSÉ REDACTED, con cedula de identidad número REDACTED, 4) OSCAR REDACTED, con cedula de identidad número REDACTED, 5) JOSÉ REDACTED, con cedula de identidad número REDACTED, 6) NOLVIA REDACTED, con cedula de identidad número REDACTED, 7) RUTH REDACTED, con cedula de identidad número REDACTED, 8) ZOILA REDACTED, con cedula de identidad número REDACTED, **SON AUTHENTICAS**: por haber sido puestas en mi presencia y haberse identificado con su respectivo documento legal correspondiente.- **DOY FE**.

Yo JOSE REDACTED, mayor de edad, con Identidad numero REDACTED, residente en laCiudad de San Pedro Sula, en el pleno goce de mes facuetades mentales, libre y espontáneamente rindo la siguiente declaracion, asegurando que es cierto lo que en ella expreso.

1. Soy hermano de Zoela Corea, la madre de Dennis Zelaya. Soy como 4 años mayor que Denniscuando el era pequeño lo sacaba a pasear.
2. Cuando era ya un adolescente como de 12 años el y su familia se traseadaron a vivlr a la Ciudad de San Pedro Sula. Sus padres eran estrictos y siempre estaban al cuidado de sus hijos; les enseñaban a Dennis y sus hermanastrabajar en los negocios que tenian.
3. Yo recuerdo que Dennis siempre estudlaba y jugaba el futbol. El estuvo en un equipo de futbol y pasaba mucho tiempo practicando con sus compañeros.
4. Salfamos a pasear a bares y tomábamos cervezas, pero todo dentro de lo normal. Nunca mire a Dennis comportarse agresivo, como toda persona tiene su carácter pero siempre un chico normal; todo era diversión sana.
5. Dennis siempre sabia comportarse bien en todos los lugares donde ba.
6. Después de un tiempo Dennis se fue pare los Estados Unidos. Cuando yo viajaba para ese pais, me hospedaba en su apartamento por un lapso de 15 dias mientras me trasladaba a New York. Durante ese tiempo pude observar

que Dennis habia cambiado un poco; el se miraba preocupado y estresado, perono supe porque, cuando uno está en otro pais extraña a su familia.

7. Dennis vivia en un lugar que se llama Long Beach, California; en esa zona hablan muchas personas de la Colonia Rivera Hernández.

8. Dennisse preocupaba por sus hijos y mantenia comunicación con ellos y los apoyaba desde allá.

9. Dennis en los Estados Unidos trabajaba en la construcción con contratistas o lo que encontraba. También, recuerdo que le gustaba salir mucho a fiestas con diferentes amistades.

10. Estando yo en New York, cuando me entere de la noticia por television de lo que estaba pasando con Dennis. La situación fue duro y su madre sufrio mucho.

11. Desde ese momenta he estado en la disposicion de atestiguar de estos hechos, pero no tuve contacto con el equipo de defensa que el tenia.

Hablendo leido el contenido de esta declaración, firmo la presente a los 17 dias del mes de abril de dos mil trece.

/s/ Jose REDACTED
JOSE REDACTED

Por medea de la presente, doy de que la firma que antecede es autenticapor haber sido puesta en mi presencia.

* * *

I, Suzana Trevino, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English language have the same meanings as the statements in the Spanish language in the Affidavit of Jose REDACTED, signed and notarized on April 17, 2013.

I, JOSE REDACTED, of legal age, identification number REDACTED, resident of the city of San Pedro Sula, in full possession of my mental faculties, freely and spontaneously give the following statement, ensuring that what I express is true,

1. I am a brother of Zoila Corea, Dennis Zelaya's mother. I am about 4 years older than Dennis. When he was little, I would take him on walks.

2. When he was an adolescent around 12 years old, Dennis and his family moved to the city of San Pedro Sula. His parents were strict and always took care of their children; they taught Dennis and his sisters to work in the businesses that they had.

3. I remember that Dennis was always studying and playing soccer. He was on a soccer team and spent a lot of time practicing with his teammates.

4. We went out to bars and drank beer, but always within a normal amount. I never saw Dennis behave aggressively, as every person has his own character; but Dennis was always a normal guy, everything was healthy fun.

5. Dennis always knew to behave well everywhere he went.

6. After a while, Dennis left for the United States. When I traveled to that country, I stayed in his apartment for a period of 15 days while I was moving to New York. During that time, I could see that Dennis had changed a bit. He looked worried and stressed out, but I didn't know why, when one is in another country one misses one's family.

7. Dennis lived in a place called Long Beach, California; in this area there were many people from Colonia Rivera Hernández.

8. Dennis was worried about his children, maintaining communication with them and supporting them from there.

9. In the United States, Dennis worked in construction with contractors or in whatever he could find. Also, I recall that he liked to go out to parties a lot with different friends.

10. While I was in New York, I heard the news on the television of what was going on with Dennis. The situation was hard and his mother suffered greatly.

11. Since that time I have been willing to testify to these facts, but I had no contact with the defense team that Dennis had.

Having read the content of this declaration, signed the 17th day of April, 2013.

/s/ Jose REDACTED
JOSE REDACTED

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Suzana Trevino
Suzana Trevino

Signed and sworn before me this 29 day of Sept., 2014.

/s/ Gloria A. Flores
Notary Public, State of Texas

My commission expires 1/26/2015

* * *

EXHIBIT "C"

Affidavit of Nolvia REDACTED

* * *

Republica de Honduras

Secretaria De Relaciones Exteriores
De La Republica De Honduras

Apostille Oficial

Convention de la Haye du 5 Octobre 1981

En Honduras el Presente Documento públic ha sido firmado por:

LUCILA CRUZ MENENDEZ

Quien actua en calidad: **SECRETARIA GENERAL**

y lleva sello/ timbre correspondiente a: **CORTE SUPREMA DE JUSTICIA**

Certificado en Tegucigalpa, M.D.C. Honduras, C.A., lunes, 29 de abril de 2013

/s/ Maria Dolores Suazo Suazo
Maria Dolores Suazo Suazo
Asistente de la Secretaria General

* * *

SECRETARIA DE LA CORTE
SUPREMA DE JUSTICIA
REPUBLICA DE HONDURAS

AUTENTICA No. 5747-13

La Infrascrita, Secretaria de la Corte Suprema de Justicia CERTIFICA:
Que es auténtica la firma que antecede y dice:

ROBERTO CARLOS GUZMAN VARELA
puesta en su 325ealizer325 de:

NOTARIO

Descripcion:

Quien en Certificado de Autenticidad Serie "C" No. 117623 de fecha 17 de abril de 2013, autentica las firmas de LUIS REDACTED, MARIO REDACTED, JOSE REDACTED, OSCAR REDACTED, JOSE REDACTED, NOLVIA REDACTED, RUTH REDACTED y ZOILA REDACTED, puestas en la misma fecha en las DECLARACIONES a favor de DENNIS HUMBERTO ZELAYA COREA. Documentos para ealizer trámites en Estados Unidos de América.

* * *

/s/ Lucila Cruz Menendez
Lucila Cruz Menendez
Secretaria General

Colegio de Abogados de Honduras
Certificado de Autenticidad

El infrascrito, Notario, **ROBERTO CARLOS GUZMAN VARELA**, con domicilio en la ciudad de Tegucigalpa, Municipio del Distrito Central, y en tránsito por esta ciudad de San Pedro Sula Departamento de Cortes, inscrito con registro de la Honorable Corte Suprema de Justicia Numero mil cuatrocientos dieciocho (1418) e inscrito en el Ilustre Colegio de Abogados de Honduras con carnet numero tres mil ochocientos ochenta y ocho (3888). Con oficina profesional en la Residencial Palma Real, bloque k, casa 82, Comayagüela, Municipio del Distrito Central, **CERTIFICA**: Que las fermas que calzan en los documentos denominados Declaraciones de fecha diecisiete de abril del presente año y que corresponden a: 1) LUIS **REDACTED**, con cedula de identidad número **REDACTED**; 2) MARIO **REDACTED**, con cedula de identidad número **REDACTED**, 3) JOSÉ **REDACTED**, con cedula de identidad número **REDACTED**, 4) OSCAR **REDACTED**, con cedula de identidad número **REDACTED**, 5) JOSÉ **REDACTED**, con cedula de identidad número **REDACTED**, 6) NOLVIA **REDACTED**, con cedula de identidad número **REDACTED**, 7) RUTH **REDACTED**, con cedula de identidad número **REDACTED**, 8) ZOILA **REDACTED**, con cedula de identidad número **REDACTED**, **SON AUTHENTICAS**: por haber sido puestas en mi presencia y haberse identificado con su respectivo documento legal correspondiente.- **DOY FE**.

Yo NOLVIA **REDACTED**, mayor de edad, con identidad No. **REDACTED** residente en la Ciudad de

San Pedro Sula, en el pleno goce de mis facultades mentales, libre y espontáneamente rindo la siguiente declaración, asegurando que es cierto lo que en ella expreso.

1. Soy hermanade Dennis Zelaya con una diferencia de l0años menor que él. Cuando éramos pequeños,vivimos con nuestros padres y hermanos en la Ciudad de Tegucigalpa.
2. Durante ese tiempo, Dennis y mis hermanas asistían a la escuela y ayudaban a nuestros padres a atender el negocio que teníamos en la casa. Después nos trasladamos a la Ciudad de san Pedro Sula.
3. Dennis siempre fue chistoso yalegre. Nos cuidaba era protector y jugaba con nosotros.
4. Con sus amigos tenia carácter firme, pero se llevaba bien con ellos. Les ayudaba cuando lo necesitaban, confiaba en ellos, jugaba futbol y caminaba en su moto.
5. Le gustaba hater ejercicio, y a mi me gustaba verio cuando lo hacia. El me llevaba en su moto y me enseño a usarla.
6. Cuando Dennis regresóla primera vez de los Estados Unidos, venía muy sensible y no era el mismo por lo que había sufrido en el viaje; se veía muy delgado. Cuando se fue por segunda vez yo ya tenia 15 años.
7. Atendía a sus hijos y le compraba a Dilbert todo. Llevaba a los niños a la casa y las fotos de ellos.
8. Crecimos en un ambíent tranquilo. Cuando Dennis estaba grande, trabajo en otros lugares

afuera de la casa. Salía con sus amigos a reuniones y tomaba cerveza, pero no frente a nosotros.

9. Con las personas adultas, Dennis siempre fue respetuoso y colaborador.

10. Mis padres siempre se preocuparon para que fuéramos personas de bien, que estudiáramos y nos superáramos porque ellos solo tuvieron la oportunidad de estudiar algunos años de educatión primaria.

11. Puedo describir a Dennis como una persona amable, servicial, trabajador, orgulloso en algunas cosas, pero siempre fue bondadoso.

12. Cuando recibimos la noticia que Dennis estaba detenido, fue muy triste para la familia. Buscamos ayuda en todas partes, realizamos actividades con miembros de la comunidad y de la iglesia para recaudar dinero y para que nuestra madre viajara a los Estados Unidos.

13. Yo tuve que viajar a Tegucigalpa para iniciar mis estudios en la universidad, pero estaba impactada y profundamente triste y no pude continuar mis estudios. Mis hermanas y mi madre decidieron traerme neuvamente a San Pedro Sula así podia ayudar en las gestiones para ayudar a mi hermano. Mientras tanto mi madre y mis hermans trataban de obtener la visa Americana, per fue negada. En ese momento acudimos a Relaciones Exteriores y nos brindaron la colaboración necesaria para poder obteneria.

14. Si el equipo de defensa en aquel momento me hubiesen preguntado acerca de Dennis, hubiera estado dispuesta a testiguar sobtre la vida de Dennis aqui en Honduras.

Habiendo leído el contenido de estra declaración, firmo la presente a los 17 días del mes de abril de dos mil trece.

/s/ Nolvia REDACTED
NOLVIA REDACTED

* * *

I, Suzana Trevino, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English language have the same meanings as the statements in the Spanish language in the Affidavit of Nolvia REDACTED, signed and notarized on April 17, 2013.

I, NOLVIA REDACTED, of legal age, Identification number REDACTED, resident of the city of San Pedro Sula, in full possession of my mental faculties, freely and spontaneously give the following statement, ensuring that what I express is true.

1. I am Dennis Humberto Zelaya's sister, 10 years younger than he. When we were children, we lived with our parents and siblings in the city of Tegucigalpa.

2. During this time, Dennis and my sisters attended school and helped our parents with the business we ran out of our home. Thereafter, we moved to the city of San Pedro Sula.

3. Dennis had always been a jokester and cheerful. He took care of us, he was our protector and he played with us.

4. Among his friends, he had a firm character, but he got along well with them. He helped them when they needed it, he confided in them, played football and rode his motorcycle.

5. He enjoyed exercising and I enjoyed watching him. He would take me for rides on his motorcycle and taught me to use it.

6. When Dennis returned from the United States for the first time, he was very sensitive and was not the same person as a result of what he suffered on the trip; he was very thin. When he left for the second time, I was already 15 years old.

7. He cared for his children and he bought Dilbert everything. He would bring his children to our house as well as photos of them.

8. We grew up in a tranquil environment. When Dennis was older, he worked in other places outside of our home. He went out with his friends to parties and drank beer, but never in front of us.

9. With adults, Dennis was always very respectful and helpful.

10. My parents always took pains to ensure that we were good people that we would study and overcome because they only had the opportunity to study for a few years during elementary school.

11. I would describe Dennis as a lovable, helpful, hard-working, proud in some regards, but always generous person.

12. When we received the news that Dennis was imprisoned, it was very sad for our family. We searched for help everywhere, coordinated activities with members of the community and church to raise funds and so our mother could travel to the United States.

13. I had to travel to Tegucigalpa to begin my university studies, but I was heavily impacted and saddened and could not continue my studies. My sisters and mother decided to bring me back to San Pedro Sula so that I could help with the efforts to help my brother. During all this, my mother and sisters tried to obtain American visas, but were denied. At this point, we went to the Department of Foreign Relations and they extended the help necessary to obtain it.

14. If Dennis's defense team had at that time asked me about Dennis, I would have been ready to testify regarding Dennis's life here in Honduras.

Having read the content of his declaration, signed the 17th day of April, 2013.

/s/ Nolvia REDACTED
NOLVIA REDACTED

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Suzana Trevino
Suzana Trevino

Signed and sworn before me this 29 day of Sept., 2014.

/s/ Gloria A. Flores
Notary Public, State of Texas

My commission expires 1/26/2015

* * *

EXHIBIT "D"

Affidavit of Mario REDACTED

* * *

Republica de Honduras

Secretaria De Relaciones Exteriores
De La Republica De Honduras

Apostille Oficial

Convention de la Haye du 5 Octobre 1981

En Honduras el Presente Documento públic ha sido firmado por:

LUCILA CRUZ MENENDEZ

Quien actua en calidad: SECRETARIA GENERAL

y lleva sello/ timbre correspondiente a: CORTE SUPREMA DE JUSTICIA

Certificado en Tegucigalpa, M.D.C. Honduras, C.A., lunes, 29 de abril de 2013

/s/ Maria Dolores Suazo Suazo
Maria Dolores Suazo Suazo
Asistente de la Secretaria General

* * *

SECRETARIA DE LA CORTE
SUPREMA DE JUSTICIA
REPUBLICA DE HONDURAS

AUTENTICA No. 5747-13

La Infrascrita, Secretaria de la Corte Suprema de Justicia CERTIFICA:
Que es auténtica la firma que antecede y dice:

ROBERTO CARLOS GUZMAN VARELA
puesta en su ealizer de:

NOTARIO

Descripcion:

Quien en Certificado de Autenticidad Serie "C" No. 117623 de fecha 17 de abril de 2013, autentica las firmas de LUIS REDACTED, MARIO REDACTED, JOSE REDACTED, OSCAR REDACTED, JOSE REDACTED, NOLVIA REDACTED, RUTH REDACTED y ZOILA REDACTED, puestas en la misma fecha en las DECLARACIONES a favor de DENNIS REDACTED.- Documentos para ealizer trámites en Estados Unidos de América.

* * *

/s/ Lucila Cruz Menendez
Lucila Cruz Menendez
Secretaria General

Colegio de Abogados de Honduras
Certificado de Autenticidad

El infrascrito, Notario, **ROBERTO CARLOS GUZMAN VARELA**, con domicilio en la ciudad de Tegucigalpa, Municipio del Distrito Central, y en tránsito por esta ciudad de San Pedro Sula Departamento de Cortes, inscrito con registro de la Honorable Corte Suprema de Justicia Numero mil cuatrocientos dieciocho (1418) e inscrito en el Ilustre Colegio de Abogados de Honduras con carnet numero tres mil ochocientos ochenta y ocho (3888). Con oficina profesional en la Residencial Palma Real, bloque k, casa 82, Comayagüela, Municipio del Distrito Central, **CERTIFICA**: Que las fermas que calzan en los documentos denominados Declaraciones de fecha diecisiete de abril del presente año y que corresponden a: 1) LUIS **REDACTED**, con cedula de identidad número **REDACTED**; 2) MARIO **REDACTED**, con cedula de identidad número **REDACTED**, 3) JOSÉ **REDACTED**, con cedula de identidad número **REDACTED**, 4) OSCAR **REDACTED**, con cedula de identidad número **REDACTED**, 5) JOSÉ **REDACTED**, con cedula de identidad número **REDACTED**, 6) NOLVIA **REDACTED**, con cedula de identidad número **REDACTED**, 7) RUTH **REDACTED**, con cedula de identidad número **REDACTED**, 8) ZOILA **REDACTED**, con cedula de identidad número **REDACTED**, **SON AUTHENTICAS**: por haber sido puestas en mi presencia y haberse identificado con su respectivo documento legal correspondiente.- **DOY FE**.

Yo MARIO **REDACTED**, mayor de edad, con identidad numero **REDACTED**, residente en la

Ciudad de San Pedro Sula, en el pieno goce de mis facuitades mentales, libre y espontáneamente rindo la siguiente declaración, asegurando que es cierto lo que en ella expreso.

1. Soy primo de Dennis Zelaya por parte del Señor Francisco Blaz Zelaya, padre de el.
2. Cuando tenia como 13 años, me traslade por un periodo corto de tiempo de Danlf hacia Tegucigalpa pars realizar estudios y vivi en la casa de los padres de Dennis.
3. Yo soy mayor de edad de Dennis, con una diferencia como de 5 o 6 años. El era un niño con un comportamiento normal.
4. Lo padres de Dennis siempre estaban trabajando. Su padre ha sido estricto, pero siempre han sido una familia con buenas relaciones, aun cuando mi tío en ese momento tenia dos familias compartía dos hogares diferentes.
5. Cuando Dennis o sus hermanos desobedecían su padre los castigaba con una fja (cinturón).
6. Cuando Dennis tenía como 12 años, se trasiadaron a vivir a la Colonia Rivera Hernández en San Pedro Sula, donde siempre tenían negocio en casa.
7. Como la familia de Dennis tenían negocio de abarrotería y casa de empeño ymantenían relaciones cordiales con sus vecinos.
8. Durante ese tiempo Dennis, le ayudaba a sus padres en el negocio; asistía al colegio, practicaba futbol y como todo muchacho de su edad salía con sus amigos a fiestas.

9. Tuve la experiencia de viajar a los Estados Unidos con Dennis en su segundo viaje a esepeís. Llegamos hasta Guadalajara, Mexico, donde trabajamos con pastor de iglesia Testigos de Jehováen la Jardinería por unos meses. Alquilábamos una habitación donde luego la dueña viendo nuestra buena conducta nos hospedo en la casa de elle. Durante ese tiempo, continuamos trabajando con el pastor. Después de dos meses, tomé la decisión de regresar a Honduras, y Dennis continuo su viaje hacia los Estados Unidos.

10. Dennis deseaba viajar a los Estados Unidos pare mejorar sus condiciones de vida.

11. Recuerdo que el padre de Dennis tuvo un problema con un vecino que vivía en la esquina opuesta de la casa. Ambos tenían carácter fuerte y hubo una discusión en la quelos dosestaban armados. De acuerdo a lo expresado por la familia que mi tío disparo en defensa propia, lamentablemente el vecino falleció.

Habiendo leído el contenido de esta declaración, firmo la presente a los 17 dias del mes do abril de dos mil trece.

/s/ Mario REDACTED
MARIO REDACTED

* * *

I, Suzana Trevino, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English language have the same meanings as the statements in the Spanish language in the Affidavit of Mario REDACTED, signed and notarized on April 17, 2013.

I, MARIO REDACTED, of legal age, Identification number REDACTED, resident of the city of San Pedro Sula, in full possession of my mental faculties, freely and spontaneously give the following statement, ensuring that what I express is true.

1. I am a cousin of Dennis Zelaya, on his father Francisco Blaz Zelaya's side of the family.
2. When I was around 13 years old, I moved from Danli to Tegucigalpa to continue my studies and lived in Dennis's parents' house for a short period of time.
3. I am older than Dennis by 5 or 6 years. He was always a boy with normal behavior.
4. Dennis's parents were always working. His father was strict, but they have always been a family that got along well, even at that time when my uncle had two families and shared two different households.
5. When Dennis or his sisters disobeyed their father, he punished them with a belt.
6. When Dennis was about 12 years old, the family moved to Colonia Rivera Hernández in San Pedro Sula, where they always had a business in the home.

7. Dennis's family ran a grocery business and a pawn shop and had friendly relations with their neighbors.

8. During that time, Dennis helped his parents in the business; he was also attending school, practicing soccer and like any boy his age, he went out to parties with his friends.

9. I had the experience of traveling to the United States with Dennis on his second trip to that country. We reached Guadalajara, Mexico, where we worked with the pastor of a Jehovah's Witnesses church, gardening for several months. We were renting a room there where the owner, seeing our good behavior, then lodged us in her home. During that time, we continued working with the pastor. After two months, I made the decision to return to Honduras, and Dennis continued his journey to the United States.

10. Dennis wanted to travel to the United States to improve his living conditions.

11. I remember that Dennis's father had a problem with a neighbor who lived on the corner opposite of their house. Both men had strong characters and there was a discussion in which the two were armed. According to the views expressed by the family, my uncle shot the man in self-defense. Regrettably, the neighbor died.

Having read the content of this declaration, signed the 17th day of April, 2013.

/s/ Mario REDACTED
MARIO REDACTED

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Suzana Trevino
Suzana Trevino

Signed and sworn before me this 29 day of Sept., 2014.

/s/ Gloria A. Flores
Notary Public, State of Texas

My commission expires 1/26/201

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

CARLOS MANUEL AYESTAS, a/k/a Dennis Humberto Zelaya Corea,	§	
Petitioner,	§	**USDC No. 4:09-cv-2999**
v.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division,	§	**Capital Case**
Respondent.	§	

PETITIONER'S MOTION FOR LEAVE TO FILE *EX PARTE* AND UNDER SEAL A MOTION FOR FUNDING FOR ANCILLARY SERVICES IN ACCORDANCE WITH 18 U.S.C. § 3599(f) (Opposed Motion)

NOW COMES, Petitioner, Dennis Humberto Zelaya Corea ("Mr. Zelaya"), under the name Carlos Manuel Ayestas, in accordance with 18 U.S.C. § 3599(f), and requests leave to file *ex parte* and under seal a motion for funding for ancillary services to assist in the litigation of the issues before the Court. Mr. Zelaya would show the Court the following:

I. Introduction

This case was remanded to this Court by the Fifth Circuit to reconsider Mr. Zelaya's defaulted ineffective assistance of counsel ("IATC") claims and whether he could excuse the default under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). The parties have presented supplemental briefs concerning the impact of these cases on the issues in this case. Mr. Zelaya argued that further factual development is necessary before this Court may adjudicate the issues of cause and prejudice and the underlying merits of the IATC claims.

Accordingly, Mr. Zelaya seeks funding for ancillary services to assist in the necessary factual development. Mr. Zelaya seeks to file his motion for such services *ex parte* and under seal. In accordance with § 3599 and the procedure set forth in *Dowthitt v. Johnson*, No. H-98-3282, 1998 WL 1986954, at *2-*3 (S.D. Tex., Dec. 2, 1998), he files this motion in order to make a "proper showing . . . concerning the need for confidentiality." 18 U.S.C. § 3599(f).

II. Request to Proceed *Ex Parte* and Under Seal

A. Mr. Zelaya has a statutory right to the provision of ancillary services under 18 U.S.C. § 3599(f) when those services are reasonably necessary to ensure adequate representation in complex capital litigation.

Federal statutory law provides indigent persons a right to "adequate representation" in any post-conviction proceeding under 28 U.S.C. § 2254 seeking to vacate a death sentence. 18 U.S.C. §

3599(a)(2). Adequate representation includes a statutorily mandated right to an attorney, *id.*, and the furnishing of investigative, expert, or other reasonably necessary services "upon a finding that . . . [such] services are reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f). In *McFarland v. Scott*, the Supreme Court made clear that the right to adequate representation through counsel "reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" 512 U.S. 849, 855 (1994) (quoting 21 U.S.C. § 848(q)(7) (re-codified without substantial change as 18 U.S.C. § 3599(d)). The right to counsel "necessarily includes a right for that counsel meaningfully to research and present a defendant's . . . claims." *Id.* at 858.

As developed more fully in *Petitioner's Brief on Remand from the Fifth Circuit Concerning the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case* and *Petitioner's Reply to Respondent's Supplemental Briefing Addressing the Impact of* Martinez v. Ryan *and* Trevino v. Thaler, Mr. Zelaya must establish two layers of ineffective assistance of counsel—both at the state habeas and trial levels—in order to establish cause and prejudice under *Martinez* and *Trevino* and ultimately to prevail on the underlying IATC claims. This necessarily requires that counsel conduct the investigation that his prior counsel failed to undertake, which is itself a daunting task given the nature of the claims and the seriousness of the penalty. Prior to *Martinez* and *Trevino*, courts in this circuit routinely denied funding for procedurally

defaulted IATC claims because ineffective assistance of state habeas counsel could never justify federal review of such claims. *See Petitioner's Reply to Respondent's Supplemental Briefing*, at 7-8. This made sense under prior law because any factual development would only service an otherwise futile effort in light of the fact that federal review was precluded. *Martinez* and *Trevino* have undermined this justification and have paved the way for fruitful and reasonably necessary investigation and other ancillary services. *Id.* at 8-10.

As described in greater detail in the pleadings before this Court, Mr. Zelaya has been diagnosed with schizophrenia, undifferentiated type. Though the diagnosis occurred after his arrival on death row, the nature of schizophrenia progresses through a series of phases leading up to the psychotic episode that is both sufficiently serious and enduring to justify a diagnosis. Specifically, the prodromal phase of the disease can precede the diagnosis for many years and is often characterized by serious mental impairments. Mr. Zelaya also has a long history of drug and alcohol abuse. Mr. Zelaya left his home in Honduras when he was 18 and spent considerable time in both California and Texas. It is likely that he exhibited both mental illness and the development of substance abuse issues during this timeframe. Based on the pleadings and the evidence before the Court, because there is ample "reason to believe" that if Mr. Zelaya is afforded the opportunity to develop his claims fully through further factual development he will demonstrate that he is ultimately entitled to relief, the provision of resources under § 3599(f) are both reasonably necessary and required. *Petitioner's Reply to*

Respondent's Supplemental Briefing, at passim. *See In re Hearn*, 376 F.3d 447, (5th Cir. 2004); *Patterson v. Johnson*, No. 3:99-cv-808-G, 2000 WL 1234661, *2 (N.D. Tex., Aug. 31, 2000) (not designated for publication). *See generally Harris v. Nelson*, 394 U.S. 286, 300 (1969).

B. Mr. Zelaya has a need for confidentiality in presenting his request for investigative assistance to this Court.

Under § 3599(f), this Court may not consider any "ex parte proceeding, communication, or request . . . unless a proper showing is made concerning the need for confidentiality." 18 U.S.C. § 3599(f). In *Dowthitt v. Johnson*, No. H-98-3282, 1998 WL 1986954 (S.D. Tex., Dec. 2, 1998), the Court adopted a procedure for defendants to follow in seeking *ex parte* funding requests under § 3599(f):

> The petitioner must file and serve a brief motion seeking generally authorization for investigative or expert expenses, and must include a short case-specific statement of the need for confidentiality. The statement of need for confidentiality merely must identify generically the type of services needed and the broad issue or topic (*e.g.*, innocence) for which the services are necessary. Simultaneously, the petitioner must file *ex parte* and under seal his detailed application for authorization for the investigator or expert, and must estimate the amount of fees or expenses likely to be incurred. The petitioner must provide factual support for the funding request. The motion, but not the application with supporting materials, must be served on the respondent.

> If the Court concludes that the petitioner has established good cause for confidentiality as required by [§ 3599(f)], the Court will maintain the application (and supporting materials) under seal and will consider the merits of the request. Otherwise, the Court will give the petitioner the option of (i) withdrawing the application and having all associated materials returned to the petitioner or (ii) filing the application publicly and serving a copy on the respondent. The respondent will not be given an opportunity to comment on the detailed application or issues raised therein unless the Court so orders.

Id. at *2 (relying upon and adopting procedure set out in *Mitcham v. Calderon*, No. C-94-2854 (N.D. Cal., Dec. 20, 1996)). Other federal district courts in Texas have similarly applied this standard, and it appears to be the extant procedure applied in the Southern District of Texas. *See Patrick v. Johnson*, 37 F. Supp. 2d 815, 816 (N.D. Tex. 1999) (adopting procedure set out in *Dowthitt*). *See also Bradford v. Johnson*, 162 F. Supp. 2d 578, 579 n.1 (N.D. Tex. 2001) (citing *Patrick* for use of procedure outlined in *Dowthitt*); *Shields v. Johnson*, 48 F. Supp. 2d 719, 720-21 (S.D. Tex. 1999) (adopting procedure set out in *Dowthitt*).

Presently, Mr. Zelaya desires to retain the services of an experienced investigator to assist him in investigating the *Wiggins* claim and in gathering the necessary evidence to show cause and prejudice under *Martinez* and *Trevino*. The reasons this investigation is warranted are set out in great detail in Mr. Zelaya's *Brief on Remand from the Fifth*

Circuit Concerning the Effect of Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case* and his *Reply to Respondent's Supplemental Briefing Addressing the Impact of* Martinez v. Ryan *and* Trevino v. Thaler. Mr. Zelaya incorporates those arguments in this motion as if fully set forth. Respondent has had ample opportunity to respond to those arguments. Under § 3599(g)(2), this Court may grant up to $7,500 for investigative and expert services without further authorization from the Fifth Circuit. *See* 18 U.S.C. § 3599(g)(2). Mr. Zelaya anticipates that the proposed investigation ultimately will exceed $7,500, as more fully explained in his *ex parte* and sealed motion for funding.

Beyond this, Mr. Zelaya cannot provide any more detail concerning the nature and scope of the proposed investigation without revealing the details and results of his investigations to date, the types of evidence he desires to secure, and the identity and potential contact information of proposed witnesses, and the identity and nature of services of proposed experts, all of which would enable Respondent to become privy to potentially privileged and confidential information and would require that Mr. Zelaya forego the protections and benefits of the attorney work-product doctrine and force him to reveal his strategies ahead of the presentation of the fully developed IATC claims. In *United States v. Nobles*, 422 U.S. 225 (1975), the Court described the work product privilege expansively:

> At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze

> and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case.

Id. at 238-39. *See also Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing the nature of federal work product protection). Furthermore, revealing more potentially would expose the identity of the person providing the services and the scope and nature of the proposed investigation plan prepared by that person. *See* 2003 ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases, Guideline 4.1(B)(2), *reprinted in* 31 HOFSTRA L. REV. 913 (2003) (recommending that procedures relating to funding requests for ancillary services should be structured so as to preserve confidentiality between counsel and the person providing the services).

As a result, Mr. Zelaya seeks to provide this Court with an expanded discussion of the proposed ancillary services and why they are reasonable and necessary to the litigation of this case in an *ex parte*,

sealed motion, which is being filed contemporaneously with this motion. Mr. Zelaya requests that the Court adopt the procedure outlined in *Dowthitt*, and should the Court determine that he has not made a proper showing under § 3599(f) of the need for confidentiality, that the Court allow him to either withdraw the application and have all associated materials returned to him or file the application publicly and serve a copy on Respondent.

WHEREFORE, PREMISES CONSIDERED, Mr. Zelaya respectfully requests that this Court authorize him to file *ex parte* and under seal, his Application for Authorization for Funding for Ancillary Services to Assist in Preparation of the Claims Before this Court, as well as any supplemental requests, under 18 U.S.C. § 3599(f). Mr. Zelaya also requests any and all other relief to which he may be entitled.

Respectfully submitted,

* * *

/s/ Paul E. Mansur
Attorneys for Petitioner

Certificate of Conference

I certify that I discussed the merits of this motion with opposing counsel, Jeremy Greenwell, and Mr. Greenwell informed me that Respondent is opposed to the relief sought.

/s/ Paul E. Mansur

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

CARLOS MANUEL AYESTAS, a/k/a Dennis Humberto Zelaya Corea, Petitioner,	§	
v.	§	**USDC No. 4:09-cv-2999**
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division, Respondent.	§	**Capital Case**

ORDER

Before the Court is Petitioner Carlos Manuel Ayestas's Opposed Motion for Leave to File *Ex Parte* and Under Seal a Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f).

WHEREFORE all things considered, the Motion is **GRANTED**.

The Clerk is directed to keep Petitioner Carlos Manuel Ayestas's Motion for Authorization of Funding for Ancillary Services Under 18 U.S.C. § 3599(f), which will be considered by the Court *ex parte*, under seal. The Clerk may not file the Motion electronically, nor release it to opposing counsel.

ORDERED this _____ day of _____, 2014.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX JJ

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CARLOS AYESTAS, Petitioner,	§	
v.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§	CIVIL ACTION NO. H-09-2999

MEMORANDUM OPINION AND ORDER

Petitioner Carlos Ayestas filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state court conviction and death sentence for capital murder. On January 26, 2011, this court granted the respondent's motion for summary judgment and entered judgment for the respondent. On February 28, 2011, this court denied petitioner's motion to alter or amend the judgment. On February 22, 2012, the Fifth Circuit denied Ayestas' request for a certificate of appealability. Ayestas v. Thaler, No. 11-70004 (5th Cir., Feb. 22, 2012).

On June 6, 2013, the Supreme Court granted certiorari and remanded the case to the Fifth Circuit for reconsideration in light of the Supreme Court's decisions in Martinez v. Ryan, 132 S. Ct. 1309 (2012) (holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute

cause to excuse a procedural default of an ineffective assistance of trial counsel claim), and Trevino v. Thaler, 133 S. Ct. 1911 (2013) (holding that Martinez is applicable to the Texas capital postconviction process). The Fifth Circuit subsequently remanded the case to this court.

The parties have filed supplemental briefing on the effect of Martinez on this case. Having carefully considered Ayestas's petition, the state court record, the parties' submissions, and the applicable law, the court finds that Ayestas fails to establish cause and prejudice to excuse the procedural default of his claims of ineffective assistance of trial counsel. Therefore, the court will deny Ayestas's petition for a writ of habeas corpus on these claims. The reasons for these rulings are set out in detail below.

I. Background[1]

Ayestas was convicted of capital murder for murdering Santiaga Paneque during the course of committing or attempting to commit robbery or burglary. About two weeks before the murder Ayestas and a friend went to look at a car offered for sale by Anna McDougal, who lived across the street from Paneque. McDougal went inside her house for about 15 minutes while the men inspected the car. When she came back outside, McDougal saw the two men leaving Paneque's house. When she asked what they were doing, the men told McDougal that Paneque called them over to look at some furniture she was trying to sell.

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[1] This statement of facts is repeated from this court's January 26, 2011, Memorandum Opinion and Order granting the respondent's motion for summary judgment.

Paneque's son, Elin, left the house at about 8:30 a.m. on September 5, 1995. He returned home for lunch at 12:23 p.m.[2] and rang the doorbell, but there was no response. He put his key in the doorknob, but noticed that the door was unlocked. Upon entering, he saw that the room was ransacked and items were missing. The rest of the house was in much the same condition. Elin went to the house of a neighbor, Maria Diaz, and called 911. Upon returning to his house, he found his mother's body on the floor of the master bathroom. She had silver duct tape on her ankles. Elin returned to Diaz's house and asked her to go make sure that his mother was dead. Diaz entered the Paneque house and called Ms. Paneque's name. She found Ms. Paneque lying face down on the floor. Her face was a dark color and she was not breathing.

Detective Mark Reynolds of the Harris County Sheriff's Department testified that the house was ransacked but bore no signs of forced entry. Paneque's body was face down in a pool of blood and vomit. Her wrists were bound with the cord from an alarm clock and then wrapped in silver duct tape. She also had duct tape over her eyes and around her neck. Reynolds also testified that it was apparent that Paneque was beaten. Her face was swollen and covered with cuts and bruises. Reynolds showed neighbors photographs of two suspects, and McDougal identified them as the same two men who were in Paneque's house about two weeks before the murder. One of the suspects was Petitioner and the other was Frederico Zaldivar.

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[2] He stated that he specifically noted the time.

An autopsy conducted by Dr. Marilyn Murr, an assistant medical examiner for Harris County, revealed that Paneque suffered multiple blows while she was still alive, resulting in numerous bruises and lacerations. She had fractured bones in her right elbow and neck, and bruises on each side of her pelvic area, just above the hips. An internal examination revealed extensive hemorrhaging in the neck and head. She had another fracture, caused by a "significant amount of force," in the roof of the orbit containing her right eye. Dr. Murr determined that none of these injuries was substantial enough to kill Paneque. The cause of death was asphyxiation due to continual pressure applied to her neck for three to six minutes. Dr. Murr testified that her initial report indicated asphyxiation by ligature strangulation, but she reexamined the evidence shortly before trial at the request of the prosecutor. She then changed her conclusion to "asphyxiation due to strangulation," which allowed for the possibility that a hand or hands might have caused the asphyxia.

Police recovered fingerprints from the crime scene. Two prints recovered from the tape around Paneque's ankles, and two recovered from the roll of tape, matched Ayestas. On cross-examination the defense brought out that the two prints on the tape around Paneque's ankles were only discovered shortly before trial, approximately 20 months after the murder, based on a reexamination undertaken at the prosecutor's request.

Henry Nuila testified that he met Ayestas in mid-September 1995 at Ayestas's sister's house in Kenner, Louisiana. On September 20 an intoxicated

Ayestas told Nuila that he was involved in the murder of a woman in Houston. Ayestas asked Nuila for help in killing the other two participants in the murder because "they had spoken too much." Ayestas told Nuila that, if he declined, Ayestas would kill him. Ayestas brandished a gun. Nuila kept Ayestas talking until Ayestas passed out. Nuila then called the police. They arrested Ayestas, still in possession of the gun. Based on this evidence the jury found Ayestas guilty of capital murder for murdering Paneque during the commission or attempted commission of a burglary, robbery, or both.

During the penalty phase the State presented evidence that Ayestas served time in prison in California and Texas for possession and purchase for sale of narcotics, burglary, and misdemeanor theft. He was also the subject of a California warrant for illegal transportation of aliens. Candelario Martinez testified that three days after the murder Ayestas approached him outside a motel where he was waiting for a friend. After a brief conversation, Ayestas pulled a gun on Martinez and ordered him into one of the rooms. Martinez's friend was also in the room. Ayestas ordered Martinez onto the floor and threatened to kill him. Ayestas and two others took Martinez's personal belongings and forced him into the bathroom, where they again told him that they would kill him. Martinez begged for his life as the three discussed who would kill him. Ayestas finally said that he would let Martinez live, but threatened to kill his family if Martinez told the police. Ayestas and his accomplices left in Martinez's truck.

Based on this evidence, along with the evidence of the brutality of Paneque's murder, the jury found that there is a likelihood that Ayestas would commit future acts of criminal violence posing a continuing threat to society, that Ayestas actually caused Paneque's death or intended to kill her or anticipated that a human life would be taken, and that the mitigating evidence did not warrant a sentence of life imprisonment. Accordingly, the trial court sentenced Ayestas to death.

The TCCA affirmed Ayestas's conviction and sentence, Ayestas v. State, No. 72,928 (Tex. Crim. App. Nov. 4, 1998), and denied his application for habeas corpus relief, Ex parte Ayestas, No. WR-69,674-01 (Tex. Crim. App. Sept. 10, 2008). Ayestas filed a petition for a writ of habeas corpus in this court on September 11, 2009. As discussed above, this court denied the petition and the Fifth Circuit denied a certificate of appealability. This case is now back before this court of remand for reconsideration of several procedurally defaulted claims in light of the Supreme Court's decision in Martinez.

II. The Applicable Legal Standards

In Martinez the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . . . where appointed counsel in the initial-review collateral proceeding . . .

> was ineffective under the standards of Strickland v. Washington, 466 U.S. 668 . . . (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Martinez, 132 S. Ct. at 1318.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the Strickland test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id. at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. Id. at 688. Review of counsel's performance is deferential. Id. at 689.

In the context of a capital sentencing proceeding, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of

aggravating and mitigating circumstances did not warrant death." Strickland, 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

III. Analysis

A. Ineffective Assistance of Counsel

Ayestas contends that his counsel rendered ineffective assistance during the penalty phase by failing to investigate and present mitigating evidence of Ayestas's history of mental illness and substance abuse. He argues that trial counsel was ineffective for failing to investigate and develop this evidence, and that habeas counsel was ineffective for failing to investigate the evidence and argue that trial counsel rendered ineffective assistance.

As discussed in this court's original Memorandum Opinion and Order denying Ayestas's petition (Docket Entry No. 19), the state habeas court found that Ayestas did not agree to let counsel contact his family until after jury selection was complete. The court also found that counsel made every effort to contact the family after Ayestas permitted her to do so. The court further found that the defense investigator sent a letter to the family in Honduras on May 29, 1997, six weeks before the penalty phase began. Counsel sent a second letter on June 10, 1997, stating that Ayestas finally agreed to let counsel contact his family. Counsel sent a third letter on July 2, 1997, and faxed a letter to the United States Embassy in Honduras to expedite the family's travel to the United States. Counsel informed the embassy of the need for the family's presence at trial, arranged a July 3, 1997, meeting for the family at the embassy, and included a copy of

the June 10, 1997, letter. The court also found that counsel communicated with the Ayestas family by phone beginning on June 3, 1997. She spoke with Ayestas's mother, explained the situation, and requested the family's presence at trial. Ayestas's mother said she would call back. Counsel heard from the family on June 25, when Ayestas's sister, Somara Zalaya, informed counsel that the family would have difficulty leaving Honduras for the trial. Among the reasons stated were their father's illness and economic reasons. Counsel called the family again on June 26 and 27, and July 2. Ayestas's mother appeared unconcerned and gave evasive responses. Counsel's assistants also noted the mother's apparent lack of concern. The state habeas court further found that counsel informed the Honduran consulate of Ayestas's arrest, indictment, and upcoming trial on June 9, 1997.

Counsel has a duty to investigate possible mitigating evidence. Wiggins v. Smith, 539 U.S. 510 (2003). The record establishes, however, that counsel did attempt to investigate and develop evidence concerning Ayestas's background.

Ayestas instructed counsel not to call his family. Neither the Supreme Court nor the Fifth Circuit has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence. In fact, the Fifth Circuit has held on several occasions that a defendant cannot instruct his counsel not to present evidence at trial and then later claim that his lawyer performed deficiently by following those instructions. In Autry v. McKaskle, 727 F.2d 358 (5th Cir. 1984), the defendant

prevented his attorney from presenting any mitigating evidence during the punishment phase of his capital trial. The Fifth Circuit rejected Autry's claim that counsel was ineffective for heeding his instructions: "If Autry knowingly made the choices, [his lawyer] was ethically bound to follow Autry's wishes." Id. at 362;[3] see also Nixon v. Epps, 405 F.3d 318, 325-26 (5th Cir. 2005) (finding that counsel was not ineffective for failing to present additional mitigating evidence over client's objection: "A defendant cannot block his counsel from attempting one line of defense at trial, and then on appeal assert that counsel was ineffective for failing to introduce evidence supporting that defense."); Roberts v. Dretke, 356 F.3d 632, 638 (5th Cir. 2004) (noting that defendant may not obstruct attorney's efforts, then claim ineffective assistance of counsel); Dowthitt v. Johnson, 230 F.3d 733, 748 (5th Cir. 2000) (finding that counsel was not ineffective for failing to call family members during punishment phase where defendant stated that he did not want family members to testify).[4]

Ayestas now contends that a properly conducted investigation would have uncovered evidence of mental illness and substance abuse. Respondent

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[3] The Autry court also rejected the defendant's claim that counsel was required to request a competency hearing before agreeing to comply with the client's decisions. Id.

[4] Cf. Schriro v. Landrigan, 550 U.S. 465, 475-77 (2007) (stating that, if defendant instructed counsel not to present mitigating evidence, "counsel's failure to investigate further could not have been prejudicial under Strickland"); Amos v. Scott, 61 F.3d 333, 348-49 (5th Cir. 1995) (denying ineffective assistance claim for want of prejudice where defendant "strongly opposed" presenting any witnesses during punishment phase of trial).

points out, however, that Ayestas has not presented any medical records supporting his claim that he suffered from mental illness before his trial. While he submits some medical records from TDCJ, these records were created after Ayestas's conviction. Therefore, Ayestas fails to demonstrate that counsel had any reason to believe that Ayestas suffered from mental illness, or was deficient for failing to conduct an investigation into Ayestas's alleged mental illness.

The record also shows that state habeas counsel retained two investigators. Petitioner's Brief on Remand (Docket Entry No. 40) at Exhibits A and B. In addition to speaking with Ayestas's family, counsel obtained Ayestas's birth certificate and school records, and was aware of his criminal history and history of substance abuse. Id. at 26, Exhibit V. Habeas counsel also had Ayestas evaluated by a psychologist. Habeas counsel raised 16 claims for relief, including 10 claims of ineffective assistance of trial counsel. SH at 2-195. While it may be possible that habeas counsel could have raised an ineffective-assistance-of-trial-counsel claim regarding trial counsel's failure to investigate Ayestas's history of substance abuse, it cannot be said that the failure to do so constituted deficient performance. As the Supreme Court has noted in addressing an ineffective-assistance-of-appellate-counsel claim, counsel are not required to raise every possible non-frivolous claim. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). Moreover, in light of the extremely

brutal nature of Ayestas's crime and Ayestas's history of criminal violence, it is highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding. Therefore, Ayestas fails to demonstrate ineffective assistance of state habeas counsel and cannot show cause for his procedural default of his claims of ineffective assistance of trial counsel.

B. Investigative Funding

Ayestas contends that Martinez entitles him to time and funding to investigate and further develop his ineffective assistance claims, and he filed a motion for funding to hire an investigator to develop additional evidence in support of his ineffective assistance claim. Martinez did not create any new claims for relief or new rights. The decision, by its own terms, serves only to create a limited equitable exception to the longstanding procedural default rule articulated in Coleman v. Thompson, 501 U.S. 722 (1991). Thus, to qualify for investigative funding a petitioner must satisfy the conditions of the funding statute, 18 U.S.C. § 3599(f).

That statute provides that "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant[.]" 18 U.S.C.A. § 3599(f). Neither the Supreme Court nor the Fifth Circuit has defined the phrase "reasonably necessary" beyond the statute's plain language. The Fifth Circuit, however, requires a petitioner to show

"that he ha[s] a substantial need" for investigative or expert assistance. Clark v. Johnson, 202 F.3d 760, 768 (5th Cir.), cert. denied, 531 U.S. 831 (2000); see also Fuller v. Johnson, 114 F.3d 491, 502 (5th Cir.), cert. denied, 522 U.S. 963 (1997) ("In light of the statutory language, we first note that Fuller did not show a substantial need for expert assistance."). The Fifth Circuit upholds the denial of funding "when a petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought after assistance would only supplement prior evidence." Smith v. Dretke, 422 F.3d 269, 288 (5th Cir. 2005); see also Woodward v. Epps, 580 F.3d 318, 334 (5th Cir. 2009), cert. denied, 130 S. Ct. 2093 (2010).

As discussed above, Ayestas fails to demonstrate that trial counsel was deficient, that there is a reasonable probability that his claimed evidence of substance abuse would have changed the outcome of either his trial or his state habeas corpus proceeding, or that his state habeas counsel was ineffective. Therefore, he fails to demonstrate that the funding he requests is reasonably necessary. Accordingly, Ayestas's motion (Docket Entry No. 49) will be denied.

IV. Certificate of Appealability

Although Ayestas has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. See Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny [a]

COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. See Whitehead v. Johnson, 157 F.3d 384, 388 (5th Cir. 1988); see also Hill v. Johnson, 114 F.3d 78, 82 (5th Cir. 1997) ("the district court should continue to review COA requests before the court of appeals does").

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also United States v. Kimler, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000). The Supreme Court has stated that

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason

> would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The court has carefully considered Ayestas's argument and concludes that his ineffective assistance of trial claims are foreclosed by clear, binding precedent. The court concludes that under such precedents Ayestas has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). The court therefore concludes that Ayestas is not entitled to a certificate of appealability on his claims.

V. Conclusion and Order

For the foregoing reasons, it is **ORDERED** as follows:

1. Ayestas's ineffective assistance of counsel claims are denied as procedurally defaulted;
2. No Certificate of Appealability shall issue in this case;
3. Petitioner's Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f) (Docket Entry No. 49) is **DENIED;** and
4. Petitioner's Motion for Leave to File *Ex Parte* and Under Seal a Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f) (Docket Entry No. 48) is **MOOT.**

SIGNED at Houston, Texas, on this 18th day of November, 2014.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX KK

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CARLOS AYESTAS, Petitioner,	§	
v.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§	CIVIL ACTION NO. H-09-2999

FINAL JUDGMENT

For the reasons set forth in the court's Memorandum Opinion and Order denying petitioner Carlos Ayestas's remanded claims of ineffective assistance of counsel, this action is **DISMISSED WITH PREJUDICE**. Because petitioner Ayestas has not made a substantial showing of the denial of a constitutional right, no certificate of appealability shall issue.

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this 18th day of November, 2014.

/s/ Sim Lake

SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX LL

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CARLOS AYESTAS, Petitioner,	§	
v.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§	CIVIL ACTION NO. H-09-2999

ORDER

Petitioner Carlos Ayestas filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging his state court conviction and death sentence for capital murder (Document #1). On January 26, 2011, this court granted the respondent's motion for summary judgment and entered judgment for the respondent (Document #20). On February 28, 2011, this court denied petitioner's motion to alter or amend the judgment (Document #22). On February 22, 2012, the Fifth Circuit denied Ayestas' request for a certificate of appealability. Ayestas v. Thaler, No. 11-70004 (5th Cir., Feb. 22, 2012).

On June 6, 2013, the Supreme Court granted certiorari and remanded the case to the Fifth Circuit for reconsideration in light of the Supreme Court's decisions in Martinez v. Ryan, 132 S. Ct. 1309 (2012) (holding that ineffective assistance of state habeas

counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim), and Trevino v. Thaler, 133 S. Ct. 1911 (2013) (holding that Martinez is applicable to the Texas capital postconviction process). The Fifth Circuit subsequently remanded the case to this court.

On November 18, 2014, this court entered a Memorandum Opinion and Order finding that no cause existed under Martinez for Ayestas' procedural default of his ineffective assistance of counsel claims (Document #51). The court therefore denied relief on these claims.

On December 16, 2014, Ayestas filed a Motion to Alter or Amend the Judgment (Document #53). On January 14, 2015, he filed a Supplement to Petitioner's Rule 59 Motion to Alter or Amend the Judgment Urging Court to Grant Leave to Amend Original Petition for Writ of Habeas Corpus (Document #55). These motions remain pending.

On January 9, 2015, Ayestas filed a Motion for Leave to Amend Original Petition for Writ of Habeas Corpus (Document #54). On January 14, 2015, he filed a Motion to Stay this case to allow him to return to state court to exhaust a new claim for relief (Document #56). Respondent opposes these motions (Documents #59 and #60).

Ayestas' motions are based on a document his counsel discovered in December of 2014. The document, attached as an exhibit to Ayestas' motion for leave to amend, is a capital murder summary from the District Attorney's file. The document appears to summarize the case and contains the recommendations of several high ranking attorneys

from the District Attorney's office as to whether to seek the death penalty. Under the heading "Aggravating Circumstances," the document states: "A. THE VICTIM IS A HELPLESS 67 YEAR OLD WOMAN KILLED IN HER HOME. B. THE DEFENDANT IS NOT A CITIZEN." The second of these two statements has a line drawn through it. Ayestas now contends that this document shows that the decision to seek the death penalty was motivated by Ayestas' national origin in violation of his rights under the cruel and unusual punishment clause of the Eighth Amendment and the equal protection and due process clauses of the Fourteenth Amendment.

A. Motion for Leave to Amend

Rule 15(a) (2) of the Federal Rules of Civil Procedure provides that a court should freely grant leave to amend when justice so requires. Ayestas argues that justice requires that he be permitted to raise his new claim based on the newly discovered document.

28 U.S.C. § 2244(b) (2) states that "[a] claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application shall be dismissed" unless certain exceptions apply. Ayestas argues that his claim falls under the exception of 28 U.S.C. § 2244(b) (2) (B), that the factual predicate of the claim could not have been discovered previously through the exercise of due diligence.

While Ayestas contends that he only discovered the document on December 22, 2014, he does not allege that the document could not have been discovered previously through the exercise of due diligence. Specifically, he does not allege that the

prosecutor's file was previously unavailable to him, or that the document was omitted from the file when it was produced. Rather, Ayestas argues only that "the State . . . never made [Ayestas] aware of the memorandum or its contents at any previous time." Motion for Leave to Amend, Document #54, p. 4 n.2. While the State may not actively hide relevant material that may have some exculpatory value, it bears no responsibility to direct the defense toward potentially exculpatory evidence that either is in the possession of the defense or can be discovered through the exercise of reasonable diligence. Rector v. Johnson, 120 F.3d 551, 558-59 (5th Cir. 1997). Ayestas fails to make any showing that this document, which is dated September 19, 1995, could not have been previously discovered through the exercise of reasonable diligence. Therefore, he fails to demonstrate that the claim falls under an exception to the bar on successive petitions. Because it appears that the claim would be futile, justice does not require granting leave to amend.

B. Motion to Stay

Ayestas also requests that this court stay proceedings to allow him to raise this unexhausted claim in state court. "[S]tay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." Rhines v. Weber, 544 U.S. 269, 277 (2005).

The Texas Court of Criminal Appeals will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; [or]
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (Vernon Supp. 2002) . The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. Fearance v. Scott, 56 F.3d 633, 642 (5th Cir. 1995) (per curiam).

As discussed above, Ayestas fails to make any showing that this document could not have been discovered years ago through the exercise of reasonable diligence. As a result, he fails to demonstrate that the factual or legal basis of the claim was previously unavailable. Therefore, it is clear that, under Texas law, the Texas Court of Criminal Appeals would dismiss any petition raising this claim as an abuse of the writ. Because the claim is futile as a matter of Texas law and, as discussed above, would constitute a successive petition if

raised in this court, there is no basis for staying this case.

C. Conclusion

For the foregoing reasons, it is **ORDERED** that Petitioner's Motion for Leave to Amend Original Petition for Writ of Habeas Corpus (Document #54) and Petitioner's Motion to Stay and Hold in Abeyance the Proceedings Under *Rhines v. Weber* to Allow Petitioner to Exhaust the New Claims (Document #56) are **DENIED**.

SIGNED at Houston, Texas, this 17th day of February, 2015.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX MM

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CARLOS AYESTAS, Petitioner,	§	
v.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§	CIVIL ACTION NO. H-09-2999

Memorandum Opinion and Order

Petitioner Carlos Ayestas filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state court conviction and death sentence for capital murder. On January 26, 2011, this Court granted the respondent's motion for summary judgment and entered judgment for the respondent. On February 28, 2011, this Court denied petitioner's motion to alter or amend the judgment. On February 22, 2012, the Fifth Circuit denied Ayestas' request for a certificate of appealability. Ayestas v. Thaler, No. 11-70004 (5th Cir., Feb. 22, 2012).

On June 6, 2013, the Supreme Court granted certiorari and remanded the case to the Fifth Circuit for reconsideration in light of the Supreme Court's decisions in Martinez v. Ryan, 132 S.Ct. 1309 (2012) (holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute

cause to excuse a procedural default of an ineffective assistance of trial counsel claim), and Trevino v. Thaler, 133 S.Ct. 1911 (2013) (holding that Martinez is applicable to the Texas capital postconviction process). The Fifth Circuit subsequently remanded the case to this Court.

Following supplemental briefing by the parties, the Court, on November 18, 2014, again denied relief. On December 16, 2014, Ayestas filed a motion to alter the judgment. On January 14, 2015, he filed a supplemental motion to alter or amend the judgment.

A motion to alter or amend under Fed.R.Civ.P. 59(e) "must clearly establish either a manifest error of law or must present newly discovered evidence." Schiller v. Physicians Resource Grp., Inc., 342 F.3d 563, 567 (5th Cir. 2003) (internal quotation marks omitted). "Relief under Rule 59(e) is also appropriate where there has been an intervening change in controlling law." Id. Ayestas fails to demonstrate grounds for relief.

Ayestas cites no new evidence or change in controlling law. While Ayestas vociferously disagrees with this Court's interpretation of controlling law and application of that law to the facts of this case, such disagreement does not clearly establish manifest error and Ayestas is not entitled to relief. Moreover, because this Court's finding that Ayestas has not demonstrated manifest error is not debatable among jurists of reason, Ayestas is not entitled to a certificate of appealability from this Order. See Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000).

In his supplemental motion, Ayestas seeks to amend his petition to add an equal protection claim based on newly discovered evidence. The newly discovered evidence is not relevant to the ineffective assistance of counsel claims considered by this Court on remand from the Fifth Circuit.

While Ayestas frames his attempt to raise this new claim as merely amending his petition, the new claim is not within the scope of the remand. The remainder of Ayestas' petition has long since been dismissed, with that dismissal affirmed on appeal. Rather than seeking to amend his existing petition, Ayestas' supplemental motion actually seeks leave to file a successive petition.

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b) (3)(A); Felker v. Turpin, 518 U.S. 651, 664 (1996) ("The Act requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court."). "Indeed, the purpose and intent of [28 U.S.C. § 2244(b)(3)(A)] was to eliminate the need for the district courts to repeatedly consider challenges to the same conviction unless an appellate panel first found that those challenges had some merit." United States v. Key, 205 F.3d 773, 774 (5th Cir. 2000) (citing In re Cain, 137 F.3d 234, 235 (5th Cir. 1998)).

This Court is without jurisdiction to consider a successive petition at this late date. See Key, 205 F.3d at 774 ("Accordingly, § 2244(b)(3) (A) acts as a jurisdictional bar to the district court's asserting

jurisdiction over any successive habeas petition until [the circuit court] has granted the petitioner permission to file one.").

Accordingly,

IT IS ORDERED that Petitioner's Motion To Alter Judgment (Docket Entry 53) and Supplemental Motion To Alter Judgment (Docket Entry 55) are **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED

SIGNED this 1st day of April, 2015, at Houston, Texas.

/s/ Sim Lake
Sim Lake
United States District Judge

APPENDIX NN

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-70015

FILED
March 22, 2016
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

The district court denied Carlos Manuel Ayestas relief from his capital sentence under 28 U.S.C. § 2254. It then denied him investigative assistance under 18 U.S.C. § 3599(f) to develop evidence that might prove his previous attorneys were ineffective. Ayestas appeals these decisions. We AFFIRM.

Separately, after these district court rulings, Ayestas discovered new evidence suggesting his prosecution was based improperly on his national

origin. He moved to amend his Section 2254 application to raise this new claim. The district court denied the motion. The court also denied a certificate of appealability, and so do we.

FACTUAL AND PROCEDURAL BACKGROUND

Carlos Manuel Ayestas[1] was sentenced to death for the murder of Santiaga Paneque, who was killed during a robbery in her home in Houston, Texas, in August 1995. The Texas Court of Criminal Appeals affirmed his conviction and sentence on November 4, 1998.

In December 1998, Ayestas sought state habeas relief. His two court-appointed lawyers raised several claims, including an ineffective assistance of trial counsel ("IATC") claim. Ayestas, through his state habeas lawyers, argued that his trial counsel was ineffective because he failed to secure the attendance of Ayestas's family members from Honduras for sentencing mitigation. According to Ayestas, they "could have testified to [his] good character traits, positive upbringing, good scholastic record, and lack of juvenile or criminal record while growing up in Honduras." Ayestas did not claim that his trial counsel failed to conduct a reasonable investigation into all potentially mitigating evidence.

The State of Texas presented an affidavit from Ayestas's trial counsel in which he asserted that Ayestas ordered him not to contact Ayestas's family. According to trial counsel, Ayestas later relented and allowed him to contact Ayestas's family, either

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[1] Carlos Manuel Ayestas's true name is Dennis Zelaya Corea. We refer to the defendant as. Ayestas because that is the name under which he was charged and convicted.

shortly before or just after jury selection. The family was unable to attend sentencing. Counsel said Ayestas's mother seemed "unconcerned" about her son's trial. The Texas state district court denied relief, holding that Ayestas's trial counsel made reasonable and diligent efforts to secure the attendance of Ayestas's family and was not ineffective. The Texas Court of Criminal Appeals affirmed in 2008.

In 2009, new counsel for Ayestas filed in federal district court an application under 28 U.S.C. § 2254. For the first time, Ayestas asserted the claim that his trial counsel was ineffective by failing to make a reasonable investigation of all potentially mitigating evidence. Ayestas's federal habeas counsel argued that had trial counsel conducted a thorough investigation, he would have uncovered other mitigating evidence. Examples were Ayestas's lack of criminal history in Honduras, that one of his co-defendants in this case was a "bad influence" on him, that Ayestas suffered from schizophrenia, and that he was addicted to drugs and alcohol.

The district court determined that because this claim was not raised in the Texas state habeas proceeding, Ayestas had procedurally defaulted the claim. The court refused to excuse the default because Ayestas had failed to show "cause," as no factor external to Ayestas's defense impeded his state habeas attorneys' ability to present the broader IATC claim. In 2012, we denied Ayestas's request for a certificate of appealability ("COA"). *Ayestas v. Thaler*, 462 F. App'x 474 (5th Cir. 2012).

Shortly thereafter, the Supreme Court decided *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), which held that the ineffectiveness of state habeas counsel in failing to claim IATC may provide cause to excuse a default; if so, prejudice would need to be shown. After *Martinez*, Ayestas filed a motion for rehearing, asking us to vacate our prior judgment. We denied that motion, holding that *Martinez* did not apply in Texas because its procedures were distinguishable. The Supreme Court then extended *Martinez* to Texas in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). The Court vacated and remanded the present case to us for further consideration in light of *Trevino*. *Ayestas v. Thaler*, 133 S.Ct. 2764 (2013). We then remanded to the district court "to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*." *Ayestas v. Stephens*, 553 F. App'x 422 (5th Cir. 2014).

On remand, Ayestas filed a motion for investigative assistance under 18 U.S.C. § 3599(f), requesting a mitigation specialist in order to develop his broader IATC claim. On November 18, 2014, the district court entered a memorandum opinion and judgment, denying Ayestas habeas relief, denying a COA, and denying investigative assistance. The district court determined that neither Ayestas's trial counsel nor his state habeas counsel were ineffective, and thus the broader IATC claim was still procedurally defaulted. It then determined that because Ayestas's underlying IATC claim was still without merit, a mitigation specialist was not "reasonably necessary." On December 16, 2014, Ayestas filed a Federal Rule of Civil Procedure Rule 59(e) Motion to Alter or Amend the Judgment, re-urging many of his prior arguments.

Issues that arose after the district court's November 18 decision are also before us. On December 22, 2014, Ayestas's counsel, while reviewing portions of the prosecution's file at the Office of the District Attorney in Houston, discovered a Capital Murder Summary memorandum, prepared by the prosecution, stating that Ayestas's lack of citizenship was an "aggravating circumstance[]." Ayestas argues this indicates that the prosecution, at least in part, sought capital punishment on the improper basis of national origin.

On January 9, 2015, Ayestas filed a "Motion for Leave to Amend Original Petition for Writ of Habeas Corpus" where he, through Rule 15(e), sought to amend his Section 2254 application to add claims based on this newly discovered memorandum. He argued the state conviction and sentence violated the Equal Protection Clause and the Cruel and Unusual Punishment Clause of the Constitution. On January 14, 2015, Ayestas supplemented his December 16 Rule 59(e) motion to expand the basis upon which the district court should grant the motion.

Realizing the district court would not be able to review his new claims even if it were to grant his Rule 59(e) motion because they were not exhausted in state court, Ayestas, on the same day, filed a motion to stay the federal proceedings until the new claims could be exhausted. Ayestas argued that he had good cause for not presenting these claims previously in state court. On February 17, 2015, the district court denied Ayestas's motions for leave to amend and for a stay. The district court then denied the Rule 59(e) motion on April 1, 2015, and again denied a COA.

DISCUSSION

The procedural posture requires Ayestas to appeal multiple aspects of the district court's decisions in order for us to reach the merits of his habeas appeal and his new claims.

First, because the district court rendered final judgment by denying Ayestas habeas relief in the November 18 decision and then entered the April 1 order denying Ayestas's Rule 59(e) motion, the final judgment must be vacated before Ayestas may amend his petition and add new claims. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981). Ayestas asks us to vacate the judgment so he may amend his petition to include these new claims. Second, Ayestas appeals the part of the February 17, 2015 order denying his motion for leave to amend under Rule 15. Finally, because Ayestas's new claims are unexhausted in state court, he appeals the part of the February 17 order denying his motion for a stay and abeyance.

Generally, under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), we do not have jurisdiction to review a district court's "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" denying an inmate habeas relief unless the inmate first obtains a COA. 28 U.S.C. § 2253(c)(1)(A). While both the district court judge and the relevant court of appeals may issue a COA, the inmate must first seek a COA from the district court. *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 n.5 (2012). The district court denied Ayestas a COA in both its November 18, 2014 and April 1, 2015 decisions. For Ayestas to appeal these two decisions, therefore, we

must first grant him a COA. We grant a COA only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies an applicant's constitutional claims on procedural grounds, as the case here, a COA will issue only if the applicant shows that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether the petition states a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Somewhat separately, however, Ayestas appeals an aspect of the district court's November 18 decision denying him investigative assistance. We do have jurisdiction to review this without first requiring a COA. This is because a COA is only required of appeals of "final orders that dispose of the *merits* of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (emphasis added). "An order that merely denies a motion to enlarge the authority of appointed counsel (or that denies a motion for appointment of counsel [or assistance]) is not such an order and is therefore not subject to the COA requirement." *Id.* As such, as to the district court's decision to deny Ayestas investigative assistance, we review for abuse of discretion. *See Hill v. Johnson*, 210 F.3d 481, 487 (5th Cir. 2000). "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Ebron*, 683 F.3d 105, 153 (5th Cir. 2012).

We will discuss first the issues arising from the denial of Ayestas's request for investigative assistance. We will then address the merits of

Ayestas's IATC claim. Finally, we address Ayestas's claim that new evidence required some form of relief.

I. Investigative Assistance

As mentioned above, an appeal of a denial of investigate assistance does not require a COA and is reviewed for abuse of discretion. For this particular claim, Ayestas argues the district court should not have examined the merits of his IATC claims until it provided him with a mitigation specialist and allowed the results of that investigation to be presented. Ayestas argues that under *Martinez* and *Trevino*, in order to prove that his prior lawyers were ineffective, he must be allowed to develop and discover what his prior lawyers should have developed or discovered. As Ayestas explains:

> By prematurely deciding that [Ayestas's] IATC claims were facially meritless, without affording resources for factual development under 18 U.S.C. § 3599(f). . . . the district court summarily dismissed [Ayestas's] petition based solely on its review of the allegations contained in the original petition filed in 2009.

Ayestas argues that the merits of the IATC claim cannot rest on the record from the state habeas proceeding, which allegedly is infected with the work of ineffective counsel. Instead, he must be allowed to develop new evidence to support his factual allegations. The argument, at least in part, is foreclosed by circuit precedent. A district court is within its discretion to deny an application for funding "when a petitioner has [] failed to supplement his funding request with a viable constitutional claim that is not procedurally barred."

Brown v. Stephens, 762 F.3d 454, 459 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1733 (2015). Though *Brown* dealt with a defendant bringing an initial federal habeas claim and Ayestas's current appeal is before us on remand from the Supreme Court, the difference in procedural postures is not significant. The district court properly considered the procedural default prior to approving Section 3599(f) funding for this federal habeas claim.

In two recent post-*Martinez* and *Trevino* opinions, this court held that Section 3599(f) funding is available if the district court finds that there is a "substantial need" for such services to pursue a claim that is not procedurally barred. *Allen v. Stephens*, 805 F.3d 617, 626, 638–39 (5th Cir. 2015); *Wade v. Stephens*, 777 F.3d 250, 266 (5th Cir.), *cert. denied*, 136 S. Ct. 86 (2015). Ayestas argues the district court, and by extension these two precedents, required an impossibility: proving deficient performance in order to be given resources to discover the evidence of deficient performance. He mischaracterizes the requirement. There must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented. *Brown*, 762 F.3d at 459. The basic point is that a prisoner cannot get funding to search for whatever can be found to support an as-yet unidentified basis for holding that his earlier counsel was constitutionally ineffective. Instead, there must be a substantiated argument, not speculation, about what the prior counsel did or omitted doing. Ayestas indeed offered such an argument. We interpret the district court's ruling as being that any evidence of ineffectiveness, even if found, would not support relief.

The district court did not abuse its discretion when it declined to authorize a mitigation specialist for Ayestas before it determined the viability of Ayestas's claim. We still must decide if the district court properly denied Ayestas investigative assistance on the basis that a mitigation specialist was not "reasonably necessary" because his claim was meritless. For this, we must briefly analyze the underlying merits of Ayestas's claim. *See id.* We turn now to that question.

II. Overcoming Procedural Default

In order for the *Martinez/Trevino* exception to excuse a prior procedural default, Ayestas must present a viable claim that his trial counsel was ineffective and his state habeas attorneys were ineffective in failing to raise trial counsel's errors. *See Martinez*, 132 S. Ct. at 1321.

Ineffective assistance requires deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it falls "below an objective standard of reasonableness" based on "prevailing professional norms." *Id.* at 687–88. "[C]ounsel has a duty to make reasonable investigations," *id.* at 691, including an "obligation to conduct a thorough investigation of the defendant's background," *Porter v. McCollum*, 558 U.S. 30, 39 (2009). Nonetheless, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The specific deficiencies Ayestas raises concern his trial counsel's alleged failure to investigate and present evidence about his drug use and possible mental illness. Such evidence allegedly would have

been discoverable if counsel had contacted family and friends in Ayestas's home country of Honduras. Ayestas also points out that his trial counsel, for 15 months, stopped pursuing mitigation evidence, only resuming his activities 10 days prior to jury selection. He also claims his counsel in the initial state habeas proceedings should have made an issue of this alleged ineffectiveness by trial counsel.

The district court rejected the claim because Ayestas barred his attorneys from contacting his family, finally relenting around the time of jury selection for his sentencing. Trial counsel then pursued evidence from the family in Honduras and California by sending letters to them and finally seeking the assistance of the United States embassy in Honduras. A few days after Ayestas allowed contact, trial counsel also telephoned Ayestas's mother in Honduras. As we have already discussed and as detailed in the district court's opinion, the mother showed a lack of zeal in assisting the defense. The district court relied on caselaw in which we held that an attorney is not ineffective for failing to present evidence in mitigation at sentencing if the defendant orders counsel not to do so. *See Autry v. McKaskle*, 727 F.2d 358, 362–63 (5th Cir. 1984). We conclude that an attorney's compliance with a capital-case client's demand that contact not be made with his family is similarly permitted.

On appeal now, counsel argues that such interference by the defendant heightens the need for counsel to search for other sources of information about the defendant's background. We do not agree with such a standard. Regardless of the specific problems that arise in the investigation for

mitigation evidence, the issue is whether counsel made "reasonable investigations or . . . a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 691). The district court pointed out trial counsel's efforts and discoveries despite the limitations under which counsel worked. Counsel spoke by phone with Ayestas's family. He acquired Ayestas's school records and was aware of the substance abuse. Ayestas was also examined by a psychologist.

The district court's analysis of the argument about Ayestas's mental illness relied in part on the absence of any evidence that medical records existed at the time of trial that would have shown Ayestas was suffering from any mental illness. Therefore, defense counsel were not on notice of the need to pursue this line of inquiry at his initial trial. This analysis injects the question of whether current counsel has shown a need for funding to pursue what evidence might have existed to alert trial counsel of Ayestas's mental state in 1997. The briefing here discusses at great length the progression of schizophrenia, the mental disease with which Ayestas has now been diagnosed. The diagnosis was not made until 2000 while he was in prison after his conviction for this crime. Perhaps, counsel posits, a thorough investigation now would uncover evidence that early-stage symptoms of this disease were exhibiting themselves in 1997, making trial counsel's unawareness of those symptoms constitutionally ineffective representation.

We find no error in the rejection of the claims about mental illness. Trial counsel in 1997 had

Ayestas examined by a psychologist. The briefing does not suggest that the examination itself revealed a basis for further investigation. Whatever medical understandings could be applied now to evidence about Ayestas's mental condition in 1997, with the benefit of hindsight and perhaps additional knowledge about this disease, does not undermine that trial counsel was not constitutionally ineffective in pursuing what appeared at that time to be unproductive lines of inquiry.

Moreover, even if trial counsel had pursued such lines of inquiry, the results would not have been fruitful. A *Strickland* ineffective representation requires deficient performance *and* prejudice. Prejudice means "a reasonable probability . . . the result of the proceeding would have been different." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014). A reasonable probability is a "substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quotation marks omitted). The district court held that regardless of any deficiencies in the investigation about substance abuse, no prejudice resulted because, in light of the brutality of the crime, it was "highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding." That finding is valid. Further, even if Ayestas had entered the early stages of an as-yet undiagnosed mental illness, we find it at best to be conceivable, but not substantially likely, that the outcome may have been different.

As to the district court's refusal to fund an investigation into Ayestas's mental condition as it

existed almost 20 years ago, we find no abuse of discretion. The arguments about what might be discovered still have to be examined from the perspective of what trial counsel reasonably should have known and done those many years ago. *See Strickland*, 466 U.S. at 689. The district court did not err in failing to allow this inquiry to proceed.

Because we agree with the district court that there is no basis to hold trial counsel was constitutionally ineffective for failing to investigate further the possible questions of mental illness and substance abuse, Ayestas's state habeas counsel were not ineffective for failing to pursue that line of investigation. Raising every conceivable claim is neither required nor beneficial. Ayestas's state habeas counsel raised 16 claims for relief, including 10 ineffective assistance of counsel arguments. There was no shortage of claims, though mere numbers of claims do not dispel the possibility of constitutional ineffectiveness. Because we have already held that trial counsel was not ineffective in failing to raise these particular claims, at most, Ayestas's arguments deal with the strategic choices the state habeas lawyers had to make. Such choices are not subject to second-guessing by a court. *Strickland*, 466 U.S. at 689.

In summary, the district court correctly rejected the assertion that Ayestas's trial and state habeas attorneys were ineffective. As a result, because Ayestas cannot show that his claim is viable and that assistance was reasonably necessary, the district court properly determined that Ayestas was not entitled to a mitigation specialist under Section 3599(f).

To the extent that Ayestas also appeals the district court's November 18, 2014 memorandum opinion denying habeas relief on the merits, and the April 1, 2015 order denying his Rule 59(e) motion, these appeals are foreclosed. For these appeals, Ayestas requires a COA. As mentioned above, one requirement for the granting of a COA is a valid claim on the merits. For the same reasons that we have explained above for why Ayestas is not entitled to a mitigation specialist, we also deny Ayestas a COA.

III. Amendment to Section 2254 Application

We now turn to the issues that arise from the district court's denial of Ayestas's motion to supplement his claims with arguments about the Capital Murder Summary memorandum. That is the document that suggested that Ayestas's non-citizen status was one of two factors that led to the recommendation that the death penalty should be sought.

Ayestas's appellate brief supporting his application for a COA acknowledged that in district court, he had "sought to amend with a claim wholly unrelated to the IATC claim litigated under *Trevino*," which was the matter we had remanded to the court. Under what is called the "mandate rule," a district court on remand is limited to consideration of the matters that were the subject of the order from the appellate court. *Henderson v. Stadler*, 407 F.3d 351, 354 (5th Cir. 2005). We have used this articulation of the requirement:

> [T]he mandate rule compels compliance on remand with the dictates of a superior court

> and forecloses relitigation of issues expressly or impliedly decided by the appellate court.

Id. (quoting *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004)). The district court held that adding the unrelated claims to the subject of the remand would violate the mandate rule. Ayestas disagrees, first arguing the district court misinterpreted our remand order as limiting its discretion, and then arguing the mandate rule does not preclude the addition of a new claim. We disagree on both fronts.

As to his first argument, Ayestas claims that the last sentence of our remand order shows that we expressly declined to constrain the district court:

> We REMAND to the district court to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of Trevino. *We express no view on what decisions the district court should make on remand.*

Ayestas v. Stephens, 553 F. App'x 422, 423 (5th Cir. 2014) (emphasis added). Ayestas reads too much into this sentence. As the penultimate sentence clearly reads, the remand was limited to the reconsideration of the defaulted IATC claim. The last sentence simply indicates that we express no view as to how the district court should decide or approach this IATC claim.

As to his second argument, Ayestas relies heavily on a Supreme Court case as standing for the proposition that "the circuit court may consider and decide any matters left open by the mandate of this court." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). But as explained above, our remand

order did not leave open any matter other than the defaulted IATC claim. If anything, *Sanford Fork* supports our decision in this case. The district court did not err in its interpretation of our remand order or its application of the mandate rule.

Additionally, Ayestas's new constitutional claims are unexhausted in state court and therefore cannot now be reviewed here on the merits. 28 U.S.C. § 2254(b)(1)(A). Realizing the need for exhaustion, Ayestas filed a motion to stay and hold the proceedings in abeyance in order to return to state court to exhaust the new claims. "When a petitioner brings an unexhausted claim in federal court, stay and abeyance is appropriate when the district court finds that there was good cause for the failure to exhaust the claim; the claim is not plainly meritless; and there is no indication that the failure was for purposes of delay." *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010). "[W]hen a petitioner is procedurally barred from raising [his] claims in state court, his unexhausted claims are plainly meritless." *Id.* (quotation marks omitted).

Hence, we turn to examining whether Ayestas would be barred under Texas law from bringing his new claims.

In Texas, subsequent petitions for writ of habeas corpus in a death penalty case based upon newly available evidence, are handled as follows:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the

> application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application . . . .

TEX. CRIM. PROC. CODE art. 11.071 § 5(a)(1). Section 5(e) further provides that "[f]or purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." *Id.* art. 11.071 § 5(e).

Thus, Ayestas must show he exercised reasonable diligence in trying to obtain evidence such as the memorandum. Ayestas's briefing in this court and in the district court never suggests he sought to examine the prosecution's file prior to the December 22 search that uncovered the memorandum. A defense counsel's "duty to investigate" includes "efforts to secure relevant information in the possession of the prosecution [and] law enforcement authorities." ABA STANDARDS FOR CRIMINAL JUSTICE: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS 4-4.1(c) (4th ed. 2015); *Rompilla v. Beard*, 545 U.S. 374, 385–89 (2005) (explaining that counsel's failure to look at a "readily available" prosecution file was deficient performance for the purposes of

Strickland). Moreover, Ayestas makes no claim "that [the memorandum] was unavailable to [his] trial counsel through a reasonably diligent examination of the case file the prosecution had made available." *Amador v. Dretke*, No. Civ.SA-02-CA- 230-XR, 2005 WL 827092, at *18 (W.D. Tex. Apr. 11, 2005).

Ayestas offers two explanations for his failure to investigate the prosecution's file. First, he argues that the state was under an affirmative duty to turn the memorandum over to him. Second, he argues he properly assumed a search of the folder would not uncover information as material as this document.

The first explanation is based on Ayestas's having made two demands under *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, the state must disclose exculpatory evidence upon a proper demand by the defendant. *Id.* at 87. While the state was under an obligation to turn over such evidence in this case, there is no *Brady* violation if counsel, "using reasonable diligence, could have obtained the information." *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994). Though Ayestas is not asserting a *Brady* claim, the fact that there would be no *Brady* violation unless Ayestas were reasonably diligent in discovering evidence suggests to us that any alleged failings on the part of the state in not turning over the memorandum do not mitigate Ayestas's own responsibility to undertake a reasonably diligent investigation for the purposes of Section 5 of Article 11.071. Hence, even though Ayestas filed two *Brady* demands, Ayestas was under an independent obligation to use reasonable diligence in attempting to discover exculpatory evidence, which, as explained above, he failed to do.

Ayestas's latter justification is that he "rightly assume[d] that the District Attorney would redact its file of all privileged work product, such as the capital murder summary." This justification is circular and without merit. Ayestas essentially argues that he assumed no material information was contained in the file, and that had he known such material information was in the file, he would have investigated the file. Of course, had Ayestas known the memorandum was in the file he would have no doubt searched it, but the point of reasonable diligence is to ensure that such evidence is found when it is unclear where such evidence may lie. Ayestas's assumption does not serve to excuse his duty to secure information in the possession of the prosecution. ABA STANDARDS FOR CRIMINAL JUSTICE: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS 4-4.1(c) (4th ed. 2015).

Additionally, as discussed above, even if not procedurally defaulted, Ayestas's claims are not likely to succeed on the merits. The district court did not err in concluding Ayestas's trial counsel and his state habeas attorneys were not ineffective. Hence, even if Ayestas could prove he exercised reasonable diligence in discovering the memorandum, he still cannot exhaust his new claims in the Texas courts because his claims are not meritorious.

Ayestas did not exercise reasonable diligence in attempting to discover the memorandum earlier. Therefore, he is unable to prove under Section 5 of Article 11.071(a) of the Texas Code of Criminal Procedure that he would be entitled to a subsequent state habeas hearing to exhaust his new claims that are based on the newly discovered memorandum.

Hence, Ayestas has not exhausted, and will not be able to exhaust, these claims in state court. Because we are unable to review unexhausted claims, the district court did not abuse its discretion in denying Ayestas's motion for a stay and abeyance.

The request for certificate of appealability is DENIED. The judgment rejecting Ayestas's Section 2254 application is AFFIRMED.

APPENDIX OO

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-70015

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, the Petition for Rehearing En Banc is DENIED. *See* FED. R. APP. P. 35; 5TH CIR. R. 35.

The Petition for Panel Rehearing is also DENIED.

In the petitions, Ayestas makes two arguments to which we will respond. First, he alleges errors with our holding under *Rhines v. Weber*, 544 U.S. 269 (2005). Specifically, he claims we held that "because federal habeas counsel did not locate the Siegler Memo sooner, it was insufficiently diligent under" Article 11.071 § 5(a)(1) of the Texas Code of Criminal Procedure. We were not, though, referring to the diligence of federal habeas counsel in locating the memo. It was the diligence of Ayestas's trial counsel that we were describing. Our analysis is consistent with *Rhines*.

Ayestas also points out that he was not in fact examined by a psychologist in 1997, but we stated he had been in our opinion. Our analysis is nonetheless unchanged. In our opinion, we held that even if Ayestas had shown there had been deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), he did not show prejudice, that is, a "substantial, not just conceivable, likelihood of a different result." *Ayestas v. Stephens*, No. 15-70015, 2016 WL 1138855, at *6 (5th Cir. Mar. 22, 2016) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)). Ayestas does not challenge this aspect of our panel opinion. Our conclusion that *Strickland* ineffectiveness was not shown remains unchanged.

FILED June 10, 2016

APPENDIX PP

(ORDER LIST: 581 U.S.)

MONDAY, APRIL 3, 2017

* * *

CERTIORARI GRANTED

16-6795 AYESTAS, CARLOS M. V. DAVIS, DIR., TX DCJ

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.

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AND
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Supreme U.S.
FILED
JUN - 9 2017
OFFICE OF THE CLERK

No. 16-6795 (CAPITAL CASE)

IN THE

Supreme Court of the United States

CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made.

PARTIES TO THE PROCEEDING

Petitioner is Carlos Manuel Ayestas, appellant below.

Respondent is Lorie Davis, Director, Texas Department of Criminal Justice (Institutional Division).

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 1

STATEMENT OF THE CASE 5

A. Statutory Background 5

B. Factual and Procedural Background 10

1. State Proceedings 10

a. Trial 10

b. State Habeas 14

2. Federal Proceedings 18

SUMMARY OF THE ARGUMENT 23

ARGUMENT 27

I. SECTION 3599(f) AUTHORIZES FUNDING FOR INVESTIGATIVE SERVICES THAT ARE REASONABLY NECESSARY TO THE REPRESENTATION, WITHOUT ANY SHOWING OF SUBSTANTIAL NEED 27

A. The Fifth Circuit's Substantial Need Test Is Incompatible With § 3599(f)'s Plain Meaning, Structure, And Purpose 27

TABLE OF CONTENTS
(continued)

Page

B. Section 3599(f)'s Origins In § 3006A Confirm That The Substantial Need Test Is Wrong 30

C. The Statutory Reasonableness Standard Enables Courts To Award Appropriate, Context-Specific Funding 39

II. MR. AYESTAS ESTABLISHED A REASONABLE NEED FOR INVESTIGATIVE SERVICES UNDER § 3599(f) 44

A. Mr. Ayestas Is Entitled To Funding For Investigative Services Because They Are Reasonably Necessary To The Representation 44

B. The Disposition Of Mr. Ayestas's § 3599(f) Motion Demonstrates How Unsuited The Substantial Need Test Is For *Wiggins* Claims Defaulted By State Habeas Counsel 51

CONCLUSION 54

STATUTORY APPENDIX 1sa

TABLE OF AUTHORITIES

Page(s)

CASES

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975).....43

Allen v. Stephens,
805 F.3d 617 (5th Cir. 2015).....29

Bragdon v. Abbott,
524 U.S. 624 (1998).....31

Brinkley v. United States,
498 F.2d 505 (8th Cir. 1974).....32, 33, 35, 37

Brown v. Stephens,
762 F.3d 454 (5th Cir. 2014).....40

Buck v. Davis,
137 S. Ct. 759 (2017).....48

Clark v. Johnson,
202 F.3d 760 (5th Cir. 2000).....36

Clark v. Martinez,
543 U.S. 371 (2005).....40

Corley v. United States,
556 U.S. 303 (2009).....28

Erlenbaugh v. United States,
409 U.S. 239 (1972).....41

TABLE OF AUTHORITIES
(continued)

Page(s)

Ex parte Soffar,
120 S.W.3d 344 (Tex. Crim. App. 2003).....21

Fuller v. Johnson,
114 F.3d 491 (5th Cir. 1997).....36

Gideon v. Wainwright,
372 U.S. 335 (1963).....5

Gregg v. Georgia,
428 U.S. 153 (1976).....7

Harbison v. Bell,
556 U.S. 180 (2009).....39

Harlow v. Fitzgerald,
457 U.S. 800 (1982).....41

Holmes v. Secs. Investor Prot. Corp.,
503 U.S. 258 (1992).....35

J.D.B. v. North Carolina,
564 U.S. 261 (2011).....41

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.,
559 U.S. 573 (2010).....34, 42, 43

Jimenez v. Quarterman,
555 U.S. 113 (2009).....28

TABLE OF AUTHORITIES
(continued)

Page(s)

Lorillard v. Pons,
434 U.S. 575 (1978).....31

Martel v. Clair,
565 U.S. 648 (2012).....*passim*

Martinez v. Ryan,
132 S. Ct. 1309 (2012).....*passim*

Matthews v. White,
807 F.3d 756 (6th Cir. 2015).....28, 36

McCleskey v. Zant,
499 U.S. 467 (1991).....50

McFarland v. Scott,
512 U.S. 849 (1994).....*passim*

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,
547 U.S. 71 (2006).....31

Mincey v. Arizona,
437 U.S. 385 (1978).....41

Patterson v. Johnson,
2000 WL 1234661 (N.D. Tex. Aug. 31, 2000).....37

Pierce v. Underwood,
487 U.S. 552 (1988).....33

TABLE OF AUTHORITIES
(continued)

Page(s)

Porter v. McCollum,
588 U.S. 30 (2009).....50, 52

Puerto Rico v. Franklin Cal. Tax-Free Trust,
136 S. Ct. 1938 (2016).....28

Rhines v. Weber,
544 U.S. 269 (2005).....21

Riley v. Dretke,
362 F.3d 302 (5th Cir. 2004).....36

Rompilla v. Beard,
545 U.S. 374 (2005).....48

SEC v. W.J. Howey Co.,
328 U.S. 293 (1946).....35

Strickland v. Washington,
466 U.S. 668 (1984).....23, 41, 42

Trevino v. Thaler,
133 S. Ct. 1911 (2013).....19, 29, 52

United States v. Alden,
767 F.2d 314 (7th Cir. 1984).....32, 43

United States v. Bass,
477 F.2d 723 (9th Cir. 1973).....32, 35

TABLE OF AUTHORITIES
(continued)

Page(s)

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435 U.S. 110 (1978).....35

United States v. Boroughs,
613 F.3d 233 (D.C. Cir. 2010).....33

United States v. Brown,
441 F.3d 1330 (11th Cir. 2006).....37

United States v. Chavis,
476 F.2d 1137 (D.C. Cir. 1973).....32

United States v. Durant,
545 F.2d 823 (2d Cir. 1976).....32, 38, 43

United States v. Greschner,
802 F.2d 373 (10th Cir. 1986).....32

United States v. Jonas,
540 F.2d 566 (7th Cir. 1976).....32

United States v. Kennedy,
64 F.3d 1465 (10th Cir. 1995).....43

United States v. Leon,
468 U.S. 897 (1984).....41

United States v. Patterson,
724 F.2d 1128 (5th Cir. 1984).....38

United States v. Pitts,
346 F. App'x 839 (3d Cir. 2009).....43

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Sanchez,
912 F.2d 18 (2d Cir. 1990) 43

United States v. Schultz,
431 F.2d 907 (8th Cir. 1970) ..... *passim*

United States v. Tate,
419 F.2d 131 (6th Cir. 1969) 32, 33

United States v. Theriault,
440 F.2d 713 (5th Cir. 1971) 32, 33, 35

Ward v. Stephens,
777 F.3d 250 (5th Cir. 2015) 28, 37

Wiggins v. Smith,
539 U.S. 510 (2003) ..... *passim*

Williams v. Taylor,
529 U.S. 362 (2000) 48, 50

STATUTES

18 U.S.C. § 3006A (1988 ed.) 7

18 U.S.C. § 3006A ..... *passim*

18 U.S.C. § 3006A(a) 6

18 U.S.C. § 3006A(c) 34

18 U.S.C. § 3006A(d) (2006 ed.) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

18 U.S.C. § 3006A(e) ..... *passim*

18 U.S.C. § 3006A(e) (2006 ed.) 9

18 U.S.C. § 3006A(g) 6

18 U.S.C. § 3006A(h) 6

18 U.S.C. § 3599 ..... 2, 5, 9, 30

18 U.S.C. § 3599(a) 9, 29

18 U.S.C. § 3599(e) 34

18 U.S.C. § 3599(f) ..... *passim*

18 U.S.C. § 3599(f) (2006 ed.) 9

18 U.S.C. § 3599(g)(1) 9

18 U.S.C. § 3599(g)(2) (2006 ed.) 9

21 U.S.C. § 848(q) (1988 ed.) ..... *passim*

21 U.S.C. § 848(q)(4) (1988 ed.) 8

21 U.S.C. § 848(q)(5) (1988 ed.) 7

21 U.S.C. § 848(q)(6) (1988 ed.) 7

21 U.S.C. § 848(q)(7) (1988 ed.) 7

21 U.S.C. § 848(q)(8) (1988 ed.) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

21 U.S.C. § 848(q)(9) (1988 ed.) 8

21 U.S.C. § 848(q)(9) (1996 ed.) 9

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 2241 1

28 U.S.C. § 2253 1

28 U.S.C. § 2253(c) 36

28 U.S.C. § 2254 ..... 1, 8

28 U.S.C. § 2255 8

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) 7, 8

Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) 9

Criminal Justice Act of 1964, Pub. L. No. 84-455, 78 Stat. 552 (1964) 5,6

Pub. L. No. 91-447, 84 Stat. 916 (1970) 6

TABLE OF AUTHORITIES (continued)

Page(s)

USA Patriot Improvement and Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (2006) 9

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Tex. Code Crim. Proc. art. 37.071, § 2(b)(1) 14

Tex. Code Crim. Proc. art. 37.071, § 2(b)(2) 14

Tex. Code Crim. Proc. art. 37.071, § 2(e) 14

Tex. Code Crim. Proc. art. 37.071, § 2(g) 14

LEGISLATIVE MATERIALS

134 Cong. Rec. H7259-02 (daily ed. Sept. 8, 1988) 7

S. Rep. No. 88-346 (1963) 5

OTHER AUTHORITIES

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TABLE OF AUTHORITIES (continued)

Page(s)

BLACK'S LAW DICTIONARY (5th ed. 1979) 28

BLACK'S LAW DICTIONARY (6th ed. 1996) 27

BLACK'S LAW DICTIONARY (10th ed. 2014) 27, 28

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Joint Advisory Concerning Campbell's Intellectual Disability Claim, *Campbell v. Davis*, No. 4:00-cv-03844 (S.D. Tex. May 10, 2017) 41

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OPINIONS BELOW

The opinion of the Fifth Circuit affirming the district court's denial of petitioner's § 3599 motion is reported at 817 F.3d 888 and reprinted in the Joint Appendix ("JA") at 377. The Fifth Circuit's amended opinion, issued after petitioner sought rehearing, is reported at 826 F.3d 214 and reprinted at JA 398. The district court's opinion denying the §3599 motion is unreported and reprinted at JA 351.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The judgment of the court of appeals was entered on June 10, 2016. The petition for a writ of certiorari was filed on November 7, 2016, within the time allowed under extensions granted by Justice Thomas, and granted on April 3, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in appendices to this brief. *See* Statutory Appendix, *infra*, at 1sa-6sa.

INTRODUCTION

Congress has enacted a statutory scheme designed to ensure that poverty does not preclude effective legal representation for individuals facing criminal penalties. The Criminal Justice Act generally provides indigent defendants with a right to such representation, in the form of counsel and services necessary to develop and prove a case. In a

distinct provision, Congress has enlarged those guarantees for indigent individuals facing the death penalty. This capital provision, 18 U.S.C. § 3599, requires higher-quality lawyers, greater funding, and representation across every phase of capital representation in federal court.

The specific guarantee of "representation" in the capital provision encompasses a right to counsel along with "investigative, expert, or other services" that are "reasonably necessary for the representation" in the post-conviction phase. 18 U.S.C. § 3599(f). The question presented here is whether a post-conviction claimant must show a "substantial need" for representation-related services in order to establish that the services are "reasonably necessary" under § 3599(f). The question all but answers itself, and every interpretive clue confirms that the answer is no.

The Fifth Circuit's "substantial need" test is inconsistent with § 3599(f)'s text and structure. It demands a higher showing of need than the statute's plain language requires. It also conflicts with the statute's conception of what a "representation" entails. The Fifth Circuit holds that a court should find a substantial need for funding under § 3599(f) only when the inmate can demonstrate the merit and procedural viability of the claim that the requested services would support. But under Congress's design, a capital representation under § 3599(f) will include the use of services to develop possible issues, including claims asserted in post-conviction litigation. A test that directs courts to prematurely judge the merit of uninvestigated claims cannot be squared with § 3599(f)'s provision

for capital representations that encompass investigations.

The statute's history confirms this interpretation. Congress borrowed the language at issue here from the Criminal Justice Act. There, the language had taken on a particular meaning: courts understood "necessary" to mean "reasonably necessary" and authorized representation-related services when a reasonable attorney working with finite means would devote resources to the requested services. Congress incorporated this meaning when it chose the same language for § 3599(f).

In precluding even services that a reasonable attorney would pursue, the substantial need test sharply narrows the reasonable necessity standard that Congress incorporated into § 3599(f). The test impedes the statute's operation and frustrates Congress's intent to ensure that indigent defendants have a reasonable opportunity to develop their claims and defenses. The test is not needed to police frivolous requests: the reasonableness standard that properly applies to § 3599(f) already functions effectively, permitting courts to deny services that do not clear the statutory standard.

The § 3599(f) motion here sought services that are reasonably necessary to the representation. The Fifth Circuit assumed trial counsel's deficiency, and for good reason. Faced with evidence of mental illness and substance abuse, trial counsel never investigated those issues and never sought to have a mental health professional evaluate Mr. Ayestas (who was later diagnosed as schizophrenic, while in prison). In fact, trial counsel performed almost no inves-

tigation, and offered the jury only a two-minute mitigation presentation that focused on Mr. Ayestas's progress in learning English while incarcerated. State habeas counsel did little more, ignoring his mitigation specialist's recommendation to undertake a meaningful investigation into Mr. Ayestas's life history.

Reviewing this case history, federal habeas counsel reasonably perceived that Mr. Ayestas might have a Sixth Amendment ineffective-assistance-of-counsel claim, and that the procedural default of that claim could be excused by state habeas counsel's own deficiencies. Federal habeas counsel reasonably sought § 3599(f) services to initiate the appropriate mitigation investigation omitted by prior counsel. That investigation was calculated to identify and develop mitigating facts that might have swayed the jury, had it heard them.

The Fifth Circuit refused investigative services for want of "substantial need"—because Mr. Ayestas could not show, at the time he made the § 3599(f) motion, that trial counsel's failure to meaningfully investigate caused him prejudice. But § 3599(f) does not require Mr. Ayestas to support his request with the very evidence the request is calculated to discover. His statutory right to representation in post-conviction litigation includes the opportunity to reasonably investigate his claims, as the request here sought to do.

The substantial need test subverts § 3599(f)'s purpose of providing meaningful representation to individuals facing the death penalty. The judgment below should be reversed.

STATEMENT OF THE CASE

A. Statutory Background

The statutory provision at issue in this case entitles indigent persons facing the death penalty to "investigative, expert, or other services" that are "reasonably necessary" to the "representation." 18 U.S.C. § 3599. Section 3599 enlarges, in capital cases, the resources otherwise available to indigent criminal litigants under the Criminal Justice Act (the "CJA").

The CJA was enacted in 1964, following *Gideon v. Wainwright*, 372 U.S. 335 (1963), and an Attorney General's study of obstacles to the effective representation of indigent criminal defendants. Attorney General Robert Kennedy explained to Congress that "defense services" are as important to adequate representation as competent counsel:

> [T]he poor man cannot hire an investigator to find the witnesses and evidence which may be indispensable to his case. He cannot retain a physician, psychiatrist, or handwriting expert. The importance of skilled investigation is underscored in police work every day. It works the same way for the defense.

S. Rep. No. 88-346, at 8 (1963) (statement of Robert F. Kennedy, Att'y Gen. of the United States).

The CJA's stated purpose was to "promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States." Criminal Justice Act of 1964, Pub. L. No. 84-455, 78 Stat. 552 (1964) (codi-

fied at 18 U.S.C. § 3006A) ("Adequate Representation of Defendants")). The CJA entitled indigent defendants to "representation"—both counsel and "investigative, expert, and other services necessary to an adequate defense." *Id.* § 3006A(a). An indigent defendant could request such services by ex parte application to the court, which was instructed to authorize "reasonable compensation" for them, up to a statutory limit, upon a finding "that the services are necessary and that the defendant is financially unable to obtain them." *Id.* § 3006A(e). As originally enacted, the CJA covered only defendants charged with "felonies or misdemeanors," from their initial appearances through direct appeal. *Id.* § 3006A(a).

The CJA required each federal district to implement representation plans arranging for representation "by private attorneys," "by attorneys furnished by a bar association or a legal aid agency," or some combination of both. *Id.* § 3006A(a). Through 1970 amendments to the Act, Congress also authorized districts to establish public defender organizations to provide CJA representation. Pub. L. No. 91-447, sec. 1, § 3006A(h), 84 Stat. 916, 919 (1970). The 1970 amendments extended § 3006A to post-conviction proceedings, providing that indigent federal post-conviction claimants could "be furnished representation ... whenever the ... court determines that the interests of justice so require." *Id.*, sec.1, § 3006A(g) (applying to "[a]ny person ... seeking relief under section 2241, 2254, or 2255 of title 28," among others).

When Congress restored the federal death penalty in the Anti-Drug Abuse Act of 1988,[1] it augmented the statutory protections for capital cases in federal court. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4181, 4387-88. The 1988 Act included a new provision, then codified at 21 U.S.C. § 848(q) (1988 ed.), creating "enhanced rights of representation" in the capital context, in light of the "seriousness of the possible penalty and ... the unique and complex nature of the litigation." *Martel v. Clair*, 565 U.S. 648, 659 (2012); *see* 134 Cong. Rec. H7259-02, H7259 (daily ed. Sept. 8, 1988) (statement of Rep. Conyers) ("Capital cases involve a complex and highly specialized body of law and procedures, and inexperienced court appointed attorneys have often had difficulty coping with such cases.").

These "enhanced rights" sought to improve the quality of capital representations—§ 848(q) imposed heightened qualification requirements for counsel in capital cases, for example. 102 Stat. at 4394 (21 U.S.C. § 848(q)(5), (6), (7) (1988 ed.)); *see McFarland v. Scott*, 512 U.S. 849, 855 n.2 (1994) (explaining that § 848(q) requires federal post-conviction attorneys "meet more stringent experience criteria" than attorneys for noncapital defendants under the [CJA]"). Congress also expanded the availability of resources in capital cases. Section 848(q) guaranteed representation from the commencement of the federal proceeding until any execution, and did not require post-conviction claimants to establish that

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[1] Congress did not immediately enact a new capital sentencing statute after the Court re-authorized the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976).

appointed representation was required by the "interests of justice." *Supra* at 6; 102 Stat. 4394 (21 U.S.C. § 848(q)(8) (1988 ed.)). Rather, the protections of § 848(q)—including the provision for representation-related services—applied automatically in all capital post-conviction litigation under 28 U.S.C. §§ 2254 and 2255:

> (4)(B) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain *adequate representation or investigative, expert, or other reasonably necessary services shall be entitled* to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
>
> ...
>
> (9) Upon a finding in ex parte proceedings that *investigative, expert or other services are reasonably necessary for the representation of the defendant*, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10)....

102 Stat. at 4393-94 (21 U.S.C. § 848(q)(4), (9) (1988 ed.)) (emphasis added).

In 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-

132, 110 Stat. 1214, Congress made a "technical amendment" to § 848(q)(9), clarifying that ex parte requests under the section required a "proper showing ... concerning the need for confidentiality," and that the court, "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation" of the defendant, "may authorize" the defendant's attorneys to obtain them. 110 Stat. at 1226 (21 U.S.C. § 848(q)(9) (1996 ed.)).

In 2006, § 848(q) was repealed and substantially re-enacted as 18 U.S.C. § 3599, "Counsel for financially unable defendants," as part of the USA Patriot Improvement and Reauthorization Act. Pub. L. No. 109-177, sec. 221, § 848(q), 120 Stat. 192, 231 (2006). Section 3599 does not alter § 848(q)(9)'s provision for "investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant." 120 Stat. at 232 (18 U.S.C. § 3599(f)). Like § 848(q), § 3599 applies at every stage of a capital representation, including proceedings under 28 U.S.C. § 2254. *See* 120 Stat. at 231 (18 U.S.C. § 3599(a)(2) (providing for "adequate representation or investigative, expert or other reasonably necessary services" "[i]n any post conviction proceeding under section 2254 or 2255 of title 28")). And § 3599 specifically provides for compensation of counsel at higher rates than under the CJA, and imposes a higher cap on expenses for representation-related services. *See Martel*, 565 U.S. at 659 (comparing § 3599(g)(1), with § 3006A(d) (2006 ed.), and § 3599(f), (g)(2) (2006 ed.), with § 3006A(e) (2006 ed.)).

B. Factual and Procedural Background

1. State Proceedings

a. Trial

Petitioner Carlos Manuel Ayestas grew up in Honduras, but shuttled between Honduras, Mexico, and the United States after he turned 18 in 1987. JA 307-08.[2] He worked occasionally in Mexico, staying with a family in Guadalajara. JA 308. Mr. Ayestas settled for a while in Long Beach, California, where he stayed with a relative and fathered a son. JA 309-10. Mr. Ayestas was living in Texas in 1995.

On September 5, 1995, Santiaga Paneque was found murdered in her home, strangled during an apparent robbery. Law enforcement identified Ferderico Zaldivar, Roberto Meza, and Mr. Ayestas as suspects. On September 19, 1995, Assistant District Attorney Kelly Siegler wrote a memorandum recommending that the State seek the death penalty against Mr. Ayestas, on the basis of two aggravating factors: that Ms. Paneque was 67 years old and murdered in her home; and that Mr. Ayestas "is not a citizen." JA 39. Mr. Ayestas was arrested in Kenner, Louisiana on September 21, 1995, and charged with capital murder. JA 44, 164.

Four months later, on January 16, 1996, the state court appointed Diana Olvera to represent Mr.

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[2] Mr. Ayestas is also known as "Denys Humberto Zelaya Corea," or "Dennis," and is occasionally identified by this name in the proceedings below.

Ayestas at his capital trial. ROA 686.[3] Connie Williams also represented Mr. Ayestas. JA 157. On February 15, 1996, trial counsel moved the state court for the appointment of an investigator, John Castillo, a former police officer who opened a private investigator service. ROA 686.[4] For nearly fifteen months, trial counsel took no further action to prepare for Mr. Ayestas's capital trial. Castillo met with Olvera and Mr. Ayestas in January and February 1996, but conducted no investigation until May 7, 1997—about a month before jury selection was to begin—when Olvera told him that the "case was set for trial" so he should "resume" his investigation. ROA 686.

At that point, Castillo had Mr. Ayestas complete a questionnaire providing basic information about his personal history. ROA 686-88. Mr. Ayestas indicated on the questionnaire that he had experienced multiple head traumas (while playing soccer, in a motorcycle accident in which he wore no helmet, and in a car accident that required X-rays of his head). ROA 687-88. Mr. Ayestas reported that he still had bad headaches. ROA 688. He informed Castillo that he had been drinking since he was sixteen years old, and that he regularly used cocaine; he was under the influence of alcohol and cocaine on the day of the murder. *Id.*

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[3] "ROA" citations refer to the Record on Appeal in *Ayestas v. Stephens*, No. 15-70015 (5th Cir. May 14, 2015).

[4] The trial court granted this motion when it was renewed on June 3, 1997, ten days before the start of jury selection. ROA 686.

Trial counsel did little with this information. They did not follow up on any of the red flags about Mr. Ayestas's head injuries, potential mental health issues, and substance abuse. *Id.* They did not meet with a single family member, friend, or acquaintance in California, Mexico, Louisiana, or Texas, where Mr. Ayestas spent much of his adult life. They never obtained the records identified in the questionnaire as necessary to a comprehensive assessment of Mr. Ayestas's personal, psychological, and social history. ROA 687-88. They did not have Mr. Ayestas evaluated by any mental health professional.

About two weeks before jury selection began on June 13, 1997, Olvera and Castillo decided to reach out to Mr. Ayestas's family in Honduras. Through a letter dated May 29, 1997, Castillo contacted Mr. Ayestas's family for the first time. ROA 5953. On June 10, three days before jury selection, Olvera wrote a letter to Mr. Ayestas's mother, identifying herself as Mr. Ayestas's attorney, and advising that the trial was scheduled for July 7, 1997 in Houston, Texas. Olvera said that it was important for them to speak. ROA 5955. Mr. Ayestas's mother received this letter on June 18 and contacted Olvera. JA 102.

On July 2, 1997, five days before trial began, Olvera wrote again to Mr. Ayestas's family in Honduras, stating that she needed his "mother and two older sisters to testify" during sentencing. ROA 5957-58. Mr. Ayestas's mother thought Olvera was going to fax her a letter that she could take to the U.S. Embassy in Tegucigalpa explaining why she needed to travel to the United States, but the letter never arrived. JA 93, 103, 113. The family mem-

bers' visa requests were denied, and no family members appeared at trial. *Id.*

The guilt phase of Mr. Ayestas's trial began on July 7, 1997 and lasted two days. ROA 1680-82. Trial counsel presented no witnesses in Mr. Ayestas's defense, and he was convicted. The sentencing phase began on July 10, 1997 and lasted less than a day. The state presented evidence about Mr. Ayestas's prior criminal offenses and behavior, along with testimony from the decedent's son. Trial counsel again presented no witnesses. The entire sentencing-phase case for the defense consisted of three letters from an instructor who taught Mr. Ayestas's English class in prison, attesting that he was a "serious and attentive" student. JA 41-43. Trial counsel attempted to introduce evidence that Mr. Ayestas had no criminal record in Honduras, but they had not prepared evidence linking the records—which referred to Mr. Ayestas by his given name, "Denys Huberto Zelaya Corea" (*supra* at 10 n.2)—to Mr. Ayestas. The trial court refused to admit them, and trial counsel's mitigation presentation lasted two minutes. ROA 4709-10.

During closing arguments, the state emphasized the absence of any mitigating evidence, and in particular the absence of any evidence that Mr. Ayestas had mental health or substance abuse problems. ROA 4747 ("Does he have anything there that would lead you to conclude there is some type of mitigation, anything at all? There is no drug problem. There's no health problem. There is no alcohol problem."). The jury found against Mr. Ayestas on the three "special issues" required under Texas law. The jury determined (1) that Mr. Ayestas would be a future

danger, Tex. Code Crim. Proc. art. 37.071, § 2(b)(1); (2) that Mr. Ayestas intended to cause death or anticipated a loss of life, *id.* § 2(b)(2); and (3) that there were no mitigating circumstances sufficient to spare Mr. Ayestas's life, *id.* § 2(e). JA 67-70. The court sentenced Mr. Ayestas to death. ROA 1682-83. If a single juror had dissented on a single special issue, no death sentence could have been imposed. Tex. Code Crim. Proc. art. 37.071, § 2(g).

The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and sentence on November 4, 1998. JA 115-38. Mr. Ayestas did not seek certiorari review from this Court.

b. State Habeas

Mr. Ayestas began the state habeas process while his direct appeal was pending, as Texas law requires. *See* Tex. Code Crim. Proc. art 11.071 § 4(a). On January 19, 1998, the TCCA appointed Gary Hart to represent Mr. Ayestas. ROA 667. On or about February 10, 1998, Hart retained mitigation specialist Tena Francis and her colleague Gerald Bierbaum to consult on the representation. ROA 668.

Francis prepared an investigation plan, which noted that the jury had heard virtually no mitigation evidence concerning Mr. Ayestas's background. JA 81. Francis reported that trial counsel "had compiled no bio-psycho-social history of Mr. Ayestas," and that this investigation would have to start anew in the post-conviction representation. JA 266. She wrote to Hart:

> The jury heard nothing about this defendant's: family, real character, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological trauma he suffered, etc. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history of the client.

JA 81. Francis further explained that "a competent social history would have to be comprehensive and include ... numerous witness interviews" with individuals from Honduras, California, Mexico, and Houston. JA 267.

The investigation plan also addressed the need to investigate Mr. Ayestas's mental health, due to his substance abuse and the "high rate of comorbidity between substance [] abuse and mental illness." JA 83, 269. Francis explained that "[i]n some cases, drug use brings about the symptoms of a mental illness," while "[i]n other cases, drug addiction begins as a means by the drug user to self-medicate systems of mental illness." JA 269. Francis concluded that a "comprehensive investigation into the bio-psycho-social history of Mr. Ayestas was warranted in order to explore the issues related to addiction and mental health." JA 81-83, 269.

Hart did not follow Francis's recommendation that a thorough background investigation be conducted. He explored the circumstances of Mr. Ayestas's arrest in Louisiana, and interviewed Mr. Ayestas's mother and two sisters. ROA 699-700. But he did nothing to investigate issues of Mr. Ayestas's

mental health or substance abuse. Nor did he pursue mitigating (or any other) evidence in the places where Mr. Ayestas had spent significant time—California, Mexico, and Texas, along with Honduras. *Id.* Francis, who had worked with Hart on other cases, later attested that Hart was generally not "concerned about conducting a comprehensive mitigation investigation," and that he did not "seek adequate funding for them." JA 265. Francis was concerned that Hart was overworked, and that his solution when overextended was to "limit[] investigation and ... rais[e] mostly record-based claims." *Id.*

The state habeas application that Hart eventually filed included a narrow claim of ineffective assistance of trial counsel ("IATC"), regarding just the failure to "secure the attendance at the punishment phase of trial of any of [Mr. Ayestas's] family members from Honduras." ROA 5270. Hart did not assert any claim related to trial counsel's failure to develop other mitigating evidence, such as evidence related to Mr. Ayestas's mental health.

Mr. Ayestas suffered a serious psychotic episode while his state application was pending. ROA 770-74. A psychiatrist subsequently diagnosed him with schizophrenia, undifferentiated type during an outpatient psychiatric follow-up.[5] JA 141-46. In 2003, a psychologist reported to Hart that Mr. Ayestas showed signs of "delusional thinking that clearly

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[5] Mr. Ayestas was in his mid-thirties at the time. As explained *infra* at 48-50, clinically significant symptoms of schizophrenia typically emerge gradually over a period of years, and are most likely to surface in males when they are in their early to mid-twenties.

needs to be monitored. He told me that he has been placed on antipsychotic medication recently and clearly his mental status needs to be evaluated closely." ROA 776.

In answering the state habeas application in 2005, the state submitted an affidavit from Olvera directed at rebutting Mr. Ayestas's IATC claim. Olvera asserted that Mr. Ayestas "did not acquiesce to having his family contacted until after jury selection was completed." JA 149. Eighteen months later, Olvera submitted a revised affidavit stating that Mr. Ayestas agreed to her contacting his family "right before jury selection began," correcting the inconsistency between her previous sworn timeline and the documented fact that she contacted the family seventeen days before jury selection commenced. JA 157. Mr. Ayestas has attested that he never instructed Olvera not to contact his family, and that he in fact had no objection to her contacting his family. JA 154.

On September 10, 2008, the TCCA denied Mr. Ayestas's application for state habeas relief, substantially adopting the findings of fact and conclusions of law offered by the state.[6] JA 199-200. The court relied on Olvera's initial affidavit to find that she was not ineffective in failing to get Mr. Ayestas's family to attend trial. JA 165-66. The court held that Mr. Ayestas's "numerous, initial assertions that he did not want his family contacted and ... trial counsel's extensive efforts to attempt to secure the presence of [Mr. Ayestas's] family from

[6] The TCCA declined to adopt six findings of fact and five conclusions of law not relevant here. JA 200.

Honduras after [Mr. Ayestas] changed his mind" precluded a finding of ineffectiveness. JA 190.

2. Federal Proceedings

On September 11, 2009, Mr. Ayestas filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas, through new counsel appointed under the CJA. ROA 8. He alleged seven claims, including, for the first time, a Sixth Amendment IATC claim under *Wiggins v. Smith*, 539 U.S. 510 (2003). ROA 14. The *Wiggins* claim asserted that trial counsel did not conduct a reasonable sentencing investigation, resulting in the failure to discover and present mitigating evidence regarding Mr. Ayestas's mental health and substance abuse. ROA 14-33. Mr. Ayestas filed his first § 3599(f) motion for a mitigation investigation on January 25, 2011. ROA 479.

The next day, on January 26, 2011, the district court granted respondent's motion for summary judgment and entered judgment for respondent on all issues raised by Mr. Ayestas's habeas petition. JA 201. The court held that Mr. Ayestas's *Wiggins* claim was unexhausted and procedurally barred. JA 209-15. At the time, a state inmate could not excuse procedural default of an IATC claim by demonstrating the ineffectiveness of state habeas counsel. *See id.* The court also denied the § 3599(f) motion, finding that Mr. Ayestas had not established a substantial need for investigative assistance. JA 235-37. The Fifth Circuit denied a certificate of appealability ("COA"). JA 241-56.

After Mr. Ayestas's federal habeas petition was denied, the Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), holding that deficient state habeas representation can excuse the default of an IATC claim. On October 9, 2012, Mr. Ayestas filed a petition for a writ of certiorari. Pet., *Ayestas v. Thaler*, No. 12-6656 (U.S. Oct. 9, 2012). While Mr. Ayestas's petition was pending, the Court decided *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), clarifying that *Martinez* applies in Texas. On June 3, 2013, the Court granted Mr. Ayestas's petition for certiorari, vacated the Fifth Circuit's judgment, and remanded the case to the Fifth Circuit for further consideration in light of *Trevino*. JA 259. The Fifth Circuit remanded to the district court with instructions to "reconsider [Mr.] Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*." JA 263.

On remand, Mr. Ayestas again filed a § 3599(f) motion for a mitigation specialist. JA 271. That motion described trial counsel's deficient mitigation investigation, including their failure to consult with any mental health expert notwithstanding Mr. Ayestas's known history of severe substance abuse and other warning signs that Mr. Ayestas had mental health issues. JA 280-81. The § 3599(f) motion likewise documented state habeas counsel's deficiency in failing to carry out the mitigation investigation recommended by his investigator. JA 279-80.

The new § 3599(f) motion also detailed how the background investigation was necessary to evaluate Mr. Ayestas's mental health. It identified changes in Mr. Ayestas's behavior and demeanor that suggested

the presence of mental illness, and described many areas of his background that trial counsel had failed to explore, including his childhood poverty and dysfunction. JA 282-84. Attached to the motion was an investigation plan prepared by an experienced mitigation specialist. JA 290-315. The plan proposed to focus on Mr. Ayestas's time in California and Mexico, where Mr. Ayestas had lived during periods when his mental health problems may have visibly worsened, and which his prior counsel had altogether ignored. JA 290, 307-13. The investigation plan documented details about the scope, goals, and projected costs of the investigation. JA 313-15.

The district court denied Mr. Ayestas's habeas petition, § 3599(f) motion, and a COA on the underlying claims. JA 351, 365. The court ruled that the default of Mr. Ayestas's *Wiggins* claim was not excused under *Martinez* because state habeas counsel had performed adequately. JA 361-62. And the court concluded that the claim itself lacked merit because trial counsel had not been deficient. JA 358-61. The court doubted that evidence of substance abuse, had it been developed, "would have changed the outcome" of Mr. Ayestas's sentencing or state habeas proceedings because the crime was "brutal" and Mr. Ayestas had a criminal history. JA 361-62.

Having decided the merit of the *Wiggins* claim and that *Martinez* did not excuse its default, the district court denied the § 3599(f) motion for resources to develop these arguments. JA 362-63. The court held that Mr. Ayestas could not show a substantial need for § 3599(f) resources because he had failed to demonstrate the ineffectiveness of either trial or state habeas counsel, and had not demonstrated "a

reasonable probability that his claimed evidence of substance abuse would have changed the outcome of either his trial or his state habeas corpus proceeding." JA 363.[7]

The Fifth Circuit denied a COA on the underlying constitutional claims and affirmed the district court's order denying funding for services under § 3599(f). JA 377. With respect to the underlying *Wiggins* claim, the Fifth Circuit agreed with the district court that the claim was neither viable nor meritorious. JA 384-91. The Fifth Circuit held that trial counsel's investigation was not deficient because trial counsel had gathered Mr. Ayestas's school records, were "aware of the substance abuse," and had spoken with Mr. Ayestas's family by phone, to the extent permitted by his "demand that contact not be made with his family." JA 388. The court also noted—incorrectly—that Mr. Ayestas was "examined by a psychologist" before trial. *Id.*

The Fifth Circuit further held that Mr. Ayestas had not established prejudice supporting his *Wiggins*

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[7] About a month after the district court's decision, while Mr. Ayestas's motion to alter or amend the judgment was pending, Mr. Ayestas's counsel discovered the Siegler Memorandum noted *supra* at 10. ROA 1132; JA 37-40. The district court and court of appeals refused to stay the federal proceeding under *Rhines v. Weber*, 544 U.S. 269 (2005), to permit state-court exhaustion of claims related to the Memorandum. *See* ROA 1152; JA 367; JA 396-97. Mr. Ayestas will seek appropriate relief in state court when this federal litigation concludes, as needed, consistent with Texas's abstention rule. *Ex parte Soffar*, 120 S.W.3d 344, 345 (Tex. Crim. App. 2003) (noting the court's practice of "automatically dismiss[ing] writ applications when the applicant also has a writ pending in federal court that relates to the same conviction").

claim, because (1) a jury would not have found evidence regarding Mr. Ayestas's substance abuse mitigating "in light of the brutality of the crime," and (2) the chance that a jury would have found mental health evidence mitigating was "at best [] conceivable, but not substantially likely." JA 389. The court also held that the default of this claim was not excused under *Martinez*, because state habeas counsel could not be deficient for failing to raise a meritless claim. JA 390.

As for Mr. Ayestas's § 3599(f) motion, the court concluded that the district court had not abused its discretion in denying it. JA 386. The court explained that Mr. Ayestas was required to establish a "'substantial need' for [] services to pursue a claim that is not procedurally barred." JA 385. This standard required a "viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented." *Id.* The court "interpret[ed]" the district court's ruling "as being that any evidence of ineffectiveness, even if found, would not support relief." *Id.* And the court agreed that § 3599(f) investigative resources were properly denied because Mr. Ayestas's *Wiggins* claim was "meritless" and thus not "viable." JA 386.

In a rehearing petition, Mr. Ayestas identified various misstatements about the record in the court's opinion. In response, the court revised and supplemented its decision, acknowledging that its no-deficiency holding had depended on the erroneous statement that Mr. Ayestas had been examined by a psychologist before trial. JA 398-99. The court concluded that its "analysis [was] nonetheless unchanged" because "even if [Mr.] Ayestas had

shown that there had been deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), he did not show prejudice." JA 399. The court did not disturb its conclusion that no prejudice resulted from any deficiency "in light of the brutality of the crime." JA 389.

SUMMARY OF THE ARGUMENT

The CJA provides basic rights of "representation" for indigent people facing criminal punishment, and § 3599 enhances those rights for capital litigants, in consideration of "the seriousness of the possible penalty and ... the unique and complex nature of the litigation." *Martel*, 565 U.S. at 659 (quotation omitted). To that end, the statute authorizes funding for counsel, along with "investigative, expert, and other services" that are "reasonably necessary for the representation." 18 U.S.C. § 3599(f). This provision applies to all stages of the representation, including post-conviction litigation under § 2254.

When courts in the Fifth Circuit apply § 3599(f) during post-conviction proceedings, however, they authorize "investigative, expert, or other services" only if the movant can show a substantial need for them. Under that standard, courts withhold services unless the movant can establish the merit and viability of a claim those services would support—and they adjudge a claim "meritless" if the movant cannot establish the underlying constitutional violation when the § 3599(f) motion is made.

The substantial need test contradicts § 3599(f), as every interpretive tool makes plain. It conflicts with the statute's text: "substantial" and "reasonable" denote different degrees of need. The test also narrows

the meaning of "representation" more than the statute's structure can bear, as § 3599 contemplates that a post-conviction representation will include the investigation and development of *possible* claims. *McFarland*, 512 U.S. at 858.

Section 3599(f)'s history also forecloses the substantial need test: Congress borrowed the language of § 3599(f) from the CJA, and that language came with a settled interpretation centered on the "reasonableness" of the request. Under the reasonableness standard that Congress incorporated into § 3599(f), representation-related services should be funded whenever a reasonable private attorney allocating limited resources would use them. A test that short-circuits the development of claims is at odds with Congress's intent because reasonable attorneys begin client representations by investigating issues, not "claims" of known merit and viability, as courts interpreting the analogous provision in the CJA appreciated.

Most fundamentally, the substantial need test frustrates Congress's purpose in enacting § 3599(f): to "promote effective representation for persons threatened with capital punishment." *Martel*, 565 U.S. at 660. In a case like this one, where the errors at issue concern prior counsel's failure to develop an adequate record, § 3599(f) authorizes resources to investigate whether counsel's deficiencies prejudiced the sentencing outcome. A standard that prematurely judges "merit" based on a record that is undeveloped *because of prior counsel's failings* deprives litigants of the enhanced representation Congress intended.

The Fifth Circuit's substantial need test is not necessary to avoid funding frivolous services: the longstanding reasonableness standard sufficiently polices abuse. Litigants still must carry the burden of establishing that the requested services are reasonably necessary, and courts retain discretion to deny baseless motions. Under Congress's design, courts can effectuate the statute's purpose without authorizing unwarranted requests.

In this case, Mr. Ayestas requested services that were "reasonably necessary for the representation," because a reasonable attorney allocating limited resources would have pursued the proposed investigation. Mr. Ayestas's § 3599(f) motion followed his federal habeas counsel's identification of a potentially meritorious claim: that trial counsel's limited sentencing investigation had doomed his chances of avoiding the death penalty. Trial counsel failed to meaningfully investigate Mr. Ayestas's background and ignored his known history of substance abuse. Counsel failed to investigate warning signs of mental illness subsequently diagnosed by a state psychologist, and never had Mr. Ayestas evaluated by a mental health professional. The jury heard essentially no mitigating evidence. Under these circumstances, counsel reasonably concluded that a federal habeas investigation could lead to the discovery of mitigating evidence that—had it been developed and presented to the jury—could well have moved a single juror to reject a death sentence. Such evidence could also excuse the procedural default of the IATC claim (that is, show its "viability"), by establishing that the claim is substantial.

Mr. Ayestas's request was denied only because the courts below applied the wrong § 3599(f) test. The Fifth Circuit held that because Mr. Ayestas could not establish the merit and viability of his IATC claim at the time he requested representation-related services, he could not show a substantial need to develop it. But Mr. Ayestas's IATC claim at the very least has *possible* merit, and thereby warrants further investigation. The Fifth Circuit itself assumed that trial counsel was deficient; it affirmed the denial of § 3599(f) services based on its conclusion that Mr. Ayestas could never show prejudice. That conclusion, however, cannot fairly be drawn without giving Mr. Ayestas the opportunity to identify and present the evidence that trial counsel failed to discover. The Fifth Circuit's use of merit and viability to decide access to § 3599(f) services inverts Congress's intent that post-conviction representations under § 3599 would encompass the use of "investigative, expert, or other services" to prove up claims.

The Fifth Circuit's substantial need test cannot be squared with § 3599(f)'s text, history, structure, or purpose. The judgment applying that test below should be reversed.

ARGUMENT

I. SECTION 3599(f) AUTHORIZES FUNDING FOR INVESTIGATIVE SERVICES THAT ARE REASONABLY NECESSARY TO THE REPRESENTATION, WITHOUT ANY SHOWING OF SUBSTANTIAL NEED

A. The Fifth Circuit's Substantial Need Test Is Incompatible With § 3599(f)'s Plain Meaning, Structure, And Purpose

Section 3599(f) authorizes funding for "investigative, expert, and other services" that are "reasonably necessary for the representation" in capital cases. The Fifth Circuit holds that § 3599(f) authorizes such funding only when a movant can establish a "*substantial* need" for the services. JA 384-86 (emphasis added). The Fifth Circuit's substantial need test is incompatible with the statute's text and structure, as well as Congress's purpose to enhance the representation of individuals facing capital punishment.

The substantial need test is not merely an interpretation of the statutory requirement that services be "reasonably necessary." It contravenes the text of the statute. "Reasonable" and "substantial" describe different degrees of necessity. *Compare, e.g.*, *Reasonable*, BLACK'S LAW DICTIONARY 1265 (6th ed. 1996) ("Fair, proper, just, moderate, suitable under the circumstances."), *with Substantial*, BLACK'S LAW DICTIONARY 1428 (6th ed. 1996) ("Of real worth and importance; of considerable value; valuable....").[8] A

[8] *Accord Reasonable*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Fair, proper, or moderate under the circumstances;

"substantial" need test requires a higher showing than "reasonable" need, contrary to § 3599(f)'s plain meaning. *See Matthews v. White*, 807 F.3d 756, 760 (6th Cir. 2015) ("The statute requires a showing that expert assistance is 'reasonably necessary,' so a rule that requires a showing of 'substantial' necessity inappropriately implies that the movant must carry a heavier burden than that contemplated by the statute." (citation and quotation omitted)). Courts may not "rewrite the statute that Congress has enacted"; the fact that the substantial need test purports to do so is reason alone to reject it. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016); *see also, e.g., Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("[W]hen the statutory language is plain, we must enforce it according to its terms."); *Corley v. United States*, 556 U.S. 303, 316 (2009) (rejecting construction that would "confuse [two] critically distinct terms").

Moreover, the Fifth Circuit's substantial need test conflicts with the statute's structure. As applied, it calls for courts to prematurely evaluate a claim's "merit" and "viability," at the time the motion is made. JA 362-63, 384-86; *see Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) ("The denial of

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sensible"); *Reasonable*, BLACK'S LAW DICTIONARY 1138 (5th ed. 1979) ("Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view."); *Substantial*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Important, essential, and material; of real worth and importance" or "[c]onsiderable in amount or value; large in volume or number."); *Substantial*, BLACK'S LAW DICTIONARY 1280 (5th ed. 1979) ("Of real worth and importance; of considerable value; valuable.").

funding will be upheld when it would only support a meritless claim, when it would only supplement prior evidence, or when the constitutional claim is procedurally barred."); *Allen v. Stephens*, 805 F.3d 617, 638 (5th Cir. 2015) (same). But § 3599(f) provides for services that are "reasonably necessary for the *representation*," and contemplates that the statutory right to representation will include the investigation and development of claims. *See* 18 U.S.C. § 3599(a), (f); *see also supra* at 5-9. That feature of Congress's design was essential to this Court's holding in *McFarland* that the § 848(q) right to counsel must apply before the formal initiation of a habeas proceeding: the petitioner would need an attorney to procure the "services of investigators and other experts [which] may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." 512 U.S. at 855. Section 3599(f) services are necessary precisely because they allow lawyers to explore the merit of a "possible claim."

In requiring a movant to demonstrate the merit of a claim as a pre-condition for authorizing the representation-related services needed to *make* that very showing, the substantial need test turns Congress's scheme on its head. The purpose of § 3599(f) is to *enhance* capital representations, ensuring that capital cases in particular are properly investigated and litigated. A claim's merit and viability frequently emerge through investigation, as this Court has recognized. *See, e.g.*, *Trevino*, 133 S. Ct. at 1919; *McFarland*, 512 U.S. at 855; *see also infra* II.B. The investigation of trial counsel's

performance, for example, may confirm deficiency and reveal evidence whose absence at trial was prejudicial, or it might not. But any test that withholds services based on an *ex ante* merits determination guts the congressionally-intended function of § 3599(f) to facilitate inmates' identification and development of issues that foreclose their death sentences.

By thwarting counsel's ability to discover and plead relevant factual allegations, the substantial need test poses a "substantial risk" that meritorious claims will "never ... be heard"—and Congress presumably "did not intend for the express requirement" of investigative services "to be defeated in this manner." *McFarland*, 512 U.S. at 856. Section 3599(f) does not require litigants to prove their claims before investigating them.

B. Section 3599(f)'s Origins In § 3006A Confirm That The Substantial Need Test Is Wrong

Congress borrowed the language at issue here from the CJA, and enacted § 848(q) (now codified at § 3599) against the backdrop of more than two decades of judicial decisions interpreting that language. The CJA authorized "investigative, expert, or other services" that are "necessary" to the representation. Courts evaluated necessity according to a reasonableness standard, awarding services when a private attorney stewarding limited resources would procure them. "[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general

matter, the intent to incorporate its judicial interpretations as well.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)); *see Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). The Fifth Circuit's substantial need test conflicts with the meaning that Congress incorporated into § 3599(f), and must be rejected for that further reason.

1. As explained *supra* at 5-9, before 1988, § 3006A governed funding for services in "all federal criminal cases and habeas litigation, regardless whether the matter involved a capital or non-capital offense." *Martel*, 565 U.S. at 658. When Congress revived the federal death penalty in 1988, it also enacted § 848(q) to govern representation "in capital cases, thus displacing § 3006A for persons facing execution (but retaining that section for all others)." *Martel*, 565 U.S. at 659. In "spinning off § 3599, Congress enacted a set of reforms to improve the quality of lawyering in capital litigation" and to provide those facing the death penalty with "enhanced" protections—including more funding for supporting services. *Id.* at 659-60. But it patterned the essential language authorizing necessary "investigative, expert, or other services" on § 3006A(e). *See supra* at 5-9.

By 1988, courts interpreted § 3006A(e)'s reference to "necessary" services as requiring funding of ser-

vices that were "*reasonably* necessary." *See United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976) ("'Necessary' should at least mean 'reasonably necessary.'"); *United States v. Schultz*, 431 F.2d 907, 911 (8th Cir. 1970) ("Considering the purpose of § 3006A(e) of the [CJA] to provide the accused with a fair opportunity to prepare and present his case, the application of the accused's counsel for such services must be evaluated on a standard of reasonableness."). Congress specifically embraced this judicial interpretation in the text of § 848(q). *Supra* at 7-8.

Lower courts had also coalesced around a test for determining when services were reasonably necessary. These decisions adopted a standard under which services were reasonably sought if "privately retained counsel, under similar circumstances, where his client's resources are not unlimited, would seek the service for his client." *United States v. Jonas*, 540 F.2d 566, 569 n.3 (7th Cir. 1976); *see United States v. Alden*, 767 F.2d 314, 318 (7th Cir. 1984); *Brinkley v. United States*, 498 F.2d 505, 510 (8th Cir. 1974); *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973); *United States v. Theriault*, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring); *see also Durant*, 545 F.2d at 827; *United States v. Tate*, 419 F.2d 131, 132-33 (6th Cir. 1969).[9] The Fifth Circuit's

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[9] Although the D.C. Circuit had not expressly adopted the private attorney standard by 1988, *see United States v. Chavis*, 476 F.2d 1137, 1143 (D.C. Cir. 1973), its test was understood to be consistent with that approach, *see United States v. Greschner*, 802 F.2d 373, 377 n.3 (10th Cir. 1986); Comment, *Developing Standards for Psychiatric Assistance for Indigent Defendants under the Criminal Justice Act*, 59 Iowa L. Rev. 726 (1974), and it has since adopted the private attorney standard

The Court has previously interpreted another provision in § 3599 by reference to its sister provision in § 3006A. In *Martel*, the Court held that, to fill a gap in § 3599(e)'s substitution-of-counsel provision, it was appropriate to borrow the standard applicable under § 3006A(c). Recognizing that § 3599 was designed to *enlarge* the protections of § 3006A, the Court reasoned that it made no sense to read "a more stringent test" into § 3599(e) than had applied under § 3006A(c). *Martel*, 565 U.S. at 660. In the absence of any indications that Congress intended a different rule for § 3599, the Court held that the "interests of justice" standard governing motions for the substitution of counsel under § 3006A(c) likewise applied to such motions under § 3599(e).

The indications that Congress intended to incorporate the § 3006A standard into § 3599 are even clearer here than in *Martel*, because here there is no gap in § 3599: Congress explicitly borrowed the reasonable necessity provision virtually word-for-word from § 3006A(e). *Supra* at 5-9; *see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 590-91 (2010) ("[C]lose textual correspondence" with a similar statutory provision "supports an inference that Congress understood the statutory formula it chose ... consistent with Federal Court of Appeals interpretations."). The single difference between the provisions only confirms that Congress intended to adopt the prevailing interpretation of § 3006A(e). Section 3599(f)'s requirement of "reasonable" necessity aligned the text of the statute with the judicial interpretation of "necessity" in the CJA, ratifying the "reasonableness" standard by which courts applied that language. *See, e.g.*,

Brinkley, 498 F.2d at 510 ("[T]he trial judge should tend to rely on the judgment of the defense attorney if the latter makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses. This is nothing more than the 'reasonableness standard' which we applied in *United States v. Schultz*." (quotation and citations omitted)); *see also Bass*, 477 F.2d at 725; *Theriault*, 440 F.2d at 717 (Wisdom, J., concurring).

Because Congress not only legislated against the backdrop of a consistent judicial interpretation, but also "voice[d] its approval" of that interpretation by incorporating it into the statutory text, *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 134 (1978), Congress codified § 3006A(e)'s prevailing "judicial gloss" in § 3599(f), including the private attorney rule that courts used in practice. *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (quotations omitted); *see also SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946) (where Congress uses "a term the meaning of which had been crystallized by ... prior judicial interpretation" it is "reasonable to attach that meaning to the term as used by Congress, especially [where] such a definition is consistent with the statutory aims").

2. The Fifth Circuit's substantial need test deviates sharply from the judicial interpretation of "reasonable necessity" that prevailed when Congress spun § 848(q) off from § 3006A, and it is unsupported by any rationale recommending it as the better interpretation of § 3599(f).

The substantial need test first appeared in Fifth Circuit case law in *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997), where the appeals court apparently misapplied the COA standard requiring a "substantial showing of the denial of a constitutional right." *Id.* at 495-96; *see* 28 U.S.C. § 2253(c). The test next surfaced in *Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000), which—though not citing *Fuller* on this point—again applied the COA "substantial showing" requirement to hold that the denial of funding had not impinged a constitutional right. *See id.* at 768 ("[B]ecause we find that [petitioner] has failed to establish that he had a substantial need for the assistance of an expert forensic pathologist under the statute, he was not denied a constitutional right that would require the issuance of a COA."). The Fifth Circuit has since relied on these passages from *Fuller* and *Clark* as articulating the statutory standard for reasonable necessity, repeatedly affirming the denial of funding for services because capital petitioners could not demonstrate a substantial need for them. *See, e.g.*, *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004) ("This Court has construed 'reasonably necessary' to mean that a petitioner must demonstrate 'a substantial need' for the requested assistance." (citing *Clark*, 202 F.3d at 768, and *Fuller*, 114 F.3d at 502)). The court has never further "explained why [this] heightened standard is appropriate" under § 3599(f). *Matthews*, 807 F.3d at 760 (expressing Sixth Circuit disagreement with the substantial need test).[10]

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[10] The Eleventh Circuit has endorsed the Fifth Circuit's substantial need rule, but likewise has never explained how the term "reasonably necessary" could possibly be construed as

In operation, the substantial need test denies funding for services whenever the court concludes that the movant's claim, as substantiated when the § 3599(f) motion is made, would fail on the merits or is otherwise not viable. *See* JA 362-63, 384-86; *Ward*, 777 F.3d at 266. Section 3599(f) movants thus face "a 'catch 22' in having to demonstrate that there is some relevant evidence [they] could discover without first having the funding to pursue that evidence." Order, *Tong v. Stephens*, No. 4:10-cv-02355 (S.D. Tex. Sept. 22, 2014), ECF No. 56, at 4; *see also Patterson v. Johnson*, 2000 WL 1234661, at *2 (N.D. Tex. Aug. 31, 2000) ("[I]t makes little sense" to force a habeas petitioner "to first try to make a good faith claim of constitutional violation [without] supplying him with the resources to investigate [his] claim's factual basis and validity.").

The Fifth Circuit's substantial need test looks nothing like the reasonableness standard applied by courts when § 848(q) was enacted. As explained above, the consensus judicial interpretation at that time was that services should be authorized when "underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." *Schultz*, 431 F.2d at 911; *see also Brinkley*, 498 F.2d at 509-12 (holding that the trial court "should have granted defendant's request for an independent psychiatric examination" under § 3006A(e) because "[d]efense counsel should have been allowed to ex-

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requiring capital defendants to show a "substantial need" for the requested services. *See, e.g., United States v. Brown*, 441 F.3d 1330, 1363-64 (11th Cir. 2006).

plore the possible effects of LSD on appellant and the issue of whether these effects might amount to insanity under our definition of that defense"); *Durant*, 545 F.2d at 827-28 (finding that defendant was improperly denied funding for an expert under § 3006A(e) because "[h]ad one been authorized, counsel might have been able to make several challenges" to the government's fingerprint evidence); *United States v. Patterson*, 724 F.2d 1128, 1131 (5th Cir. 1984) (holding that district court erred in denying funding for an expert under § 3006A(e) because "the assistance of an expert undoubtedly would have facilitated [defendant's] cross-examination of the government's expert" and it was "clear that the lack of an expert hampered [defendant's] ability to prepare and present an adequate defense"). The reasonableness standard did not require movants to demonstrate merit and viability, as the Fifth Circuit now says they must.

There also is no basis for grafting § 2253(c)'s "substantial showing" standard for certifying appeals onto § 3599(f)'s reasonable necessity provision. The two statutes serve distinct functions. Congress conditioned plenary appellate process on a showing of a substantial constitutional violation on the understanding that claims have been fully developed and examined in the federal district court. Section 3599(f) exists to enable the development of those claims. Indeed, the substantial need test *interferes* with the proper functioning of § 2253(c) because it makes estimates about a claim's merit less reliable, undercutting the basis for withholding plenary appellate review. Section 3599(f) exists precisely so that factual evidence, claims, and defenses in capital

cases can be developed, producing trust in the outcome of the district court proceeding.

Every available interpretive clue points in a single direction: when Congress enhanced the statutory right to representation for those facing the death penalty, it did not intend to make it *harder* to secure representation-related services. *Martel*, 565 U.S. at 659-60; *McFarland*, 512 U.S. at 855. The more stringent substantial need test cannot be reconciled with the reasonableness standard that Congress incorporated into § 3599(f).

C. The Statutory Reasonableness Standard Enables Courts To Award Appropriate, Context-Specific Funding

Section 3599(f) adopts a single standard, reasonable necessity, for the award of services in a capital representation. That standard is flexible enough to apply across all the phases of a capital representation—at trial, on appeal, during federal post-conviction review, and during certain state post-conviction and clemency proceedings. *See supra* at 9; *see also, e.g.*, *Martel*, 565 U.S. at 662 ("[Section] 3599 reaches not just habeas petitioners but also criminal defendants" in federal death penalty trials); *Harbison v. Bell*, 556 U.S. 180, 194 (2009) (holding that § 3599 "authorizes federally appointed counsel to represent their clients in state clemency proceedings"). Section 3599(f)'s reasonableness standard also enables the development of meritorious claims without obligating courts to fund frivolous services.

1. The Fifth Circuit has not broadly applied its substantial need test in all phases of capital

representation, and it is difficult to see how it could: there is no record by which a defendant in a capital trial, for example, could establish the "merit" and "viability" of his defenses before investigating them. A trial attorney cannot show that the mitigating evidence she would like to develop will move the jury in the face of the state's case, and a court could not possibly analyze a § 3599(f) capital trial request in that way. *See* Br. in Opp. to Cert. 25-26 (admitting that a court "could not conclude that a criminal defendant was guilty and deny investigative funding" necessary to develop a defense on that basis); *cf. Brown v. Stephens*, 762 F.3d 454, 460 (5th Cir. 2014) (holding, in clemency context, that a § 3599(f) movant "must show that the requested services are *reasonably necessary* to provide the Governor and Board of Pardons and Paroles the information they need in order to determine whether to exercise their discretion to extend grace to the petitioner in order to prevent a miscarriage of justice" (emphasis added)).

The fact that the substantial need framework does not translate across the many phases in which § 3599(f) applies further signals the test's deficiency, since Congress is not generally understood to give the same statutory phrase different meanings in different contexts. *See Martel*, 565 U.S. at 661-62 (recognizing that "whatever standard [was] adopt[ed] for § 3599" must apply in multiple legal contexts, "because the section offers counsel on the same terms to capital defendants and habeas petitioners"); *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a

statute rather than interpret one."); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (a "legislative body generally uses a particular word with a consistent meaning in a given context").[11]

More broadly, the substantial need framework's limitations highlight a deeper problem with the test: it incorrectly presupposes that the record developed in prior phases will always suffice to identify and analyze the errors that occurred in those proceedings. That assumption is frequently wrong, particularly where (as here) the error concerns prior counsel's failure to *develop* a record. The substantial need test invites speculation about the merit and viability of claims in the absence of information needed to properly analyze those issues. It thus precludes the development of potentially meritorious claims, contrary to Congress's design. *See, e.g.*, Joint Advisory Concerning Campbell's Intellectual Disability Claim, *Campbell v. Davis*, No. 4:00-cv-03844 (S.D. Tex. May 10, 2017), ECF No. 138 (discussing agreement of the parties to a conditional grant of writ of habeas corpus after a finding that petitioner was intellectually disabled even though the Fifth Circuit initially affirmed the district court's denial of funding for intellectual testing).

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[11] The flexibility of an objective reasonableness standard, in contrast, is why it has been adopted in such a wide array of contexts. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984) (ineffective assistance of counsel); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (*Miranda* custody analysis); *United States v. Leon*, 468 U.S. 897 (1984) (good-faith exception to the exclusionary rule); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Mincey v. Arizona*, 437 U.S. 385 (1978) (exigency exception to Fourth Amendment's warrant requirement).

2. The substantial need test is unsupportable as a matter of statutory interpretation for all the reasons discussed above, but it is also wrong as a matter of policy (assuming policy could ever overcome the statute's text, history, structure, and purpose). Fifty years of experience with the reasonableness standard—analyzing what a reasonable attorney of limited resources would pursue—shows that it is workable, and that it sufficiently empowers courts to deal with frivolous requests for services. *See Jerman*, 559 U.S. at 597 (rejecting argument that holding "portends ... grave consequences" because, among other things, the relevant statute "contain[ed] several provisions that expressly guard against abusive lawsuits"). Courts have extensive experience analyzing the reasonableness of attorney decisionmaking and strategy in the context of applicable professional norms, which is a touchstone not only of § 3599(f) but also of the analysis required under *Strickland*. *See Martel*, 565 U.S. at 660 (use of a well-established rule "enables courts to rely on experience and precedent, with a standard already known to work effectively"); *Wiggins*, 539 U.S. at 524 (noting that the Court has "long ... referred [to the ABA standards] as 'guides to determining what is reasonable'").

Moreover, courts applying a reasonableness rule through the private attorney standard have long recognized that it does not authorize the court to

grant "frivolous applications." *Durant*, 545 F.2d at 827.[12] Movants must carry the burden of establishing necessity by articulating specific reasons why the services are warranted. *See, e.g.*, *United States v. Pitts*, 346 F. App'x 839, 841-42 (3d Cir. 2009) ("[T]o meet this burden, a defendant must demonstrate with specificity, the reasons why such services are required." (quotation omitted)); *United States v. Kennedy*, 64 F.3d 1465, 1470 (10th Cir. 1995) (finding that "general allegations, without any specific showing," fail to meet this burden); *United States v. Sanchez*, 912 F.2d 18, 22 (2d Cir. 1990) (maintaining a movant "must articulate a reasonable basis for the requested services" (quotation and alterations omitted)). And under the reasonableness standard, a "district court [may] satisfy itself that a defendant may have a plausible [claim or] defense before granting" his § 3599(f) motion. *Alden*, 767 F.2d at 318-19. Courts may even deny funds after a finding of "reasonable necessity," if doing so serves the statute's purpose. *See* 18 U.S.C. § 3599(f); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (recognizing that judicial discretion requires "the principled application of standards consistent with [a statute's] purposes"). Courts do not have latitude to rewrite statutes for reasons of public policy, *see, e.g.*, *Jerman*, 559 U.S. at 604, but the substantial need test does not even have public policy to commend it.

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[12] Federal Rule of Civil Procedure 11 provides an additional backstop against frivolous motions. *See Jerman*, 559 U.S. at 600.

II. MR. AYESTAS ESTABLISHED A REASONABLE NEED FOR INVESTIGATIVE SERVICES UNDER § 3599(f)

Evaluated under a standard that comports with the text, history, structure, and purpose of § 3599(f), Mr. Ayestas's application for investigative services should have been granted. A reasonable attorney working with limited resources would have pursued the investigation that Mr. Ayestas requested.

A. Mr. Ayestas Is Entitled To Funding For Investigative Services Because They Are Reasonably Necessary To The Representation

Mr. Ayestas's substance abuse, social history, and mental health have never been adequately investigated. Trial counsel conducted virtually no investigation into Mr. Ayestas's personal background and no investigation at all into signs that he suffered from mental illness, including his multiple head traumas and history of substance abuse. State habeas counsel did little more, ignoring the recommendation of his own mitigation specialist that he should undertake the background and mental health investigation that trial counsel had not performed. *See supra* at 14-16. Federal habeas counsel reasonably perceived that Mr. Ayestas had a Sixth Amendment IATC claim, and that proper development of the claim could lead to mitigating evidence more compelling than trial counsel's two-minute presentation about Mr. Ayestas's prison English classes. The request to develop that evidence was reasonably necessary to the representation.

1. The Fifth Circuit's decision assumed that trial counsel's performance was deficient. JA 389. Indeed it was: trial counsel did not pursue any of the multiple red flags concerning Mr. Ayestas's mental health problems, and never had Mr. Ayestas evaluated by a mental health professional. Trial counsel did not even perform the most perfunctory investigation into his background. They reached out only to Mr. Ayestas's Honduran family, and even then only shortly before trial. *Supra* at 12. Trial counsel did not explore any of Mr. Ayestas's many contacts in the United States and Mexico, where he had spent much of his adult life. *Supra* at 12.[13] The sentencing evidence counsel offered failed to meaningfully address mitigation, as the state reminded the jury in arguing for a death sentence. *Supra* at 13-14.

The requested § 3599(f) services were reasonably necessary to discover and plead what a proper pretrial investigation would have unearthed, based on the very red flags that trial counsel ignored. Any reasonable lawyer representing Mr. Ayestas would seek to explore his mental health and history of substance abuse in order to ascertain whether and how he was prejudiced by his trial counsel's deficient representation, and would therefore seek a social history to inform a psychiatric assessment. The requested investigation was also reasonably necessary to establish excuse for the default of Mr. Ayestas's *Wig-*

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[13] This account credits Olvera's disputed assertion that Mr. Ayestas told her not to contact his family until the time of trial. Her version of events is open to doubt, however, given that she later revised her sworn story to conform to other events in the established case timeline, and given Mr. Ayestas's affidavit disputing her recollection. *Supra* at 17.

gins claim, which was not preserved by Mr. Ayestas's state habeas counsel.[14]

Mr. Ayestas's § 3599(f) motion on remand requested services that were reasonably necessary to make these showings. The motion was narrowly tailored to focus the initial investigation on time Mr. Ayestas spent in California and Mexico, reflecting habeas counsel's reasonable belief that important, previously undiscovered evidence about mental health and substance abuse could be found in those places. JA 290, 307-13. The proposed investigation was not duplicative because prior counsel had investigated only (limited) evidence in Honduras and Louisiana, not in California or Mexico. Mr. Ayestas did not request expert services, reserving a request for such services (subject to a distinct reasonable necessity showing) pending the results of the proposed investigation. JA 287.

2. Investigative services should be allowed under § 3599(f) where the "underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." *Schultz*, 431 F.2d at 911; *see also McFarland*, 512 U.S. at 855. Here, any reasonable counsel of even limited resources would have investigated further. Even the Fifth Circuit acknowledged that, at this preliminary stage, it was "conceivable" that a proper mitigation investigation would show that Mr. Ayestas "had entered the early

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[14] Under *Martinez* and *Trevino*, state habeas counsel's failure to assert the *Wiggins* claim could be excused if the claim is substantial, and if state habeas counsel was deficient. *Infra* at 51-54.

stages of an as-yet undiagnosed mental illness" by the time of the offense. JA 389.

Nevertheless, the Fifth Circuit held that the § 3599(f) motion was properly denied because Mr. Ayestas's *Wiggins* claim was meritless and not viable. JA 386-91. Even if trial counsel had been deficient, the court concluded, the motion did not show that it was "substantially likely" that a single juror would have swayed from death in light of the "brutality of the crime." JA 389. The court held that the default of the claim was not excused for similar reasons: state habeas counsel could not be faulted for having failed to raise a meritless claim. JA 390.

That holding faithfully applied the Fifth Circuit's substantial need test, contrary to § 3599(f). Mr. Ayestas could not demonstrate that the omitted mitigation investigation prejudiced him without evidence of what a reasonable investigation would have uncovered. Indeed, few indigent *Wiggins* claimants lacking adequate state habeas representation would ever be able to present a court with that information. *See infra* 51-54. In requiring Mr. Ayestas to satisfy an impossible standard, the Fifth Circuit misapplied § 3599(f) for all the reasons discussed *supra* at 27-43.

The Fifth Circuit's § 3599(f) decision cannot properly be rooted in the court's conclusion that the "brutality of the crime" precludes a sentencing-phase Sixth Amendment violation. JA 389. That proposition is legally erroneous: as the Court recently reiterated, a petitioner may satisfy *Strickland*'s prejudice prong even when the state "emphasized the brutality of [the] crime and [the

petitioner's] lack of remorse." *Buck v. Davis*, 137 S. Ct. 759, 768 (2017); *id.* at 776 ("[S]everal considerations convince us that it is reasonably probable—notwithstanding the nature of [petitioner's] crime and his behavior in its aftermath—that the proceeding would have ended differently had counsel rendered competent representation."). The suggestion that sufficient brutality avoids the need to analyze the possible impact of further mitigation evidence also contradicts the Court's precedents recognizing Sixth Amendment violations in highly aggravated cases. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 367-68, 399 (2000) (concluding that petitioner was prejudiced by trial counsel's failure to discover mitigation evidence notwithstanding evidence that petitioner had fatally beaten a man with a mattock for declining to loan him two dollars and committed two separate violent assaults on elderly victims); *Rompilla v. Beard*, 545 U.S. 374, 378, 381-83 (2005) (holding that trial counsel was ineffective in failing to conduct reasonable mitigation investigation, in case including such significant aggravation as commission of torture). The notion that brutality is determinative is all the more inappropriate in a jurisdiction such as Texas where the jury is asked not to weigh aggravating and mitigating factors, but only to decide whether there is sufficient mitigation to warrant a sentence other than death. *See supra* at 13-14.

3. Reasonable federal habeas counsel—familiar with the deficiencies of the prior investigation and knowing that Mr. Ayestas was later diagnosed as schizophrenic—would pursue a post-conviction

investigation even before every contour of the constitutional violation was fully understood. With a schizophrenia diagnosis, a social history investigation is necessary to determine the likely onset of the mental illness—typically between a person's late teens and mid-thirties, with peak emergence for males in the early to mid twenties. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-V") 102 (5th ed. 2013). The history and trajectory of Mr. Ayestas's mental illness could provide factual support for his constitutional claims, including information that would aid in establishing prejudice. *See, e.g.*, *Wiggins*, 539 U.S. at 524-26.

Clinically significant symptoms of schizophrenia develop gradually and can occur over a period of years. DSM-V at 101-02. The disease manifests as the "prodromal" and "premorbid" phases in its beginning stages, which "are typically characterized by impairments sometimes severe, in the person's judgment, perception, and ability to function." JA 282-83 n.6. An individual developing schizophrenia is often unaware that he is mentally ill, however. *See* DSM-V at 101. Someone developing symptoms will thus frequently report no prior mental health problems. And many with schizophrenia attempt to cope by self-medicating with drugs and alcohol. Thomas R. Kosten & Douglas M. Ziedonis, *Substance Abuse and Schizophrenia: Editors' Introduction*, 23 Schizophrenia Bull. 181, 183 (1997).

That Mr. Ayestas was diagnosed with paranoid schizophrenia when he was in his mid-thirties is significant. He had a history of noncriminal behavior when he was younger, and the disease thus

likely set in over the years leading up to the offense. *See supra* at 16. Given how the disease progresses, Mr. Ayestas may have experienced the onset of schizophrenia, or the prodromal phase, before the crime, while living in Mexico, California, and Texas. Mr. Ayestas's § 3599(f) motion identified California and Mexico as locations for the proposed investigation, which could lead to witnesses who observed behaviors supporting the conclusion that Mr. Ayestas was suffering from schizophrenia in 1995 or earlier. Investigating his background at those locations would also be important to identifying any mental health problems *other* than schizophrenia—none of which were considered or investigated by prior counsel.[15]

Counsel representing a habeas petitioner has a duty to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *see also Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam) ("It is unquestioned that under the prevailing professional norms[,] counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.'" (quoting *Williams*, 529 U.S. at 396); *Wiggins*, 539 U.S. at 527 (finding that inef-

[15] The proposed investigation could also discover signs of trauma, which may "precipitate the development of mental illness." JA 312. Indeed, federal habeas counsel has already discovered that during one trip through Mexico, Mr. Ayestas was held captive by a human smuggler for weeks, until his family paid for his release—exactly the type of traumatic event that would inform an appropriate mental health evaluation. JA 309.

fective assistance of counsel inquiry must "consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").[16] Here, reasonable habeas counsel would seek evidence of disease onset and any other mental health information pertinent to a potential diagnosis. JA 300.

B. The Disposition Of Mr. Ayestas's § 3599(f) Motion Demonstrates How Unsuited The Substantial Need Test Is For *Wiggins* Claims Defaulted By State Habeas Counsel

This case starkly illustrates how a substantial need test thwarts investigation into *Wiggins* violations that state habeas counsel has ignored. *Wiggins* claims are a species of IATC challenge that almost always involve evidence outside the trial record. Inmates seeking to excuse the default of these claims will, *by definition*, be unable to ground their request for representation-related services in facts sufficient to show prejudice.

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[16] The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (rev. ed. 2003), capture a professional norm requiring attorneys to conduct a mental health investigation where the facts available to counsel suggest that the investigation could conceivably uncover critical information. As the Guidelines explain, the engagement of mitigation specialists is particularly valuable because they "have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf." *Id.* at 959.

Wiggins claims are especially dependent on "investigative work" and "evidence outside the trial record." *Martinez*, 132 S. Ct. at 1317-18. A petitioner generally cannot show he was prejudiced by trial counsel's deficient investigation without some post-conviction investigation into the facts that a reasonable trial investigation would have discovered. As a result, a *Wiggins* claim depends on subsequent counsel's ability to "investigate [the defendant's] background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances." *Trevino*, 133 S. Ct. at 1919. The substantial need test cripples a petitioner's ultimate ability to plead (much less prove) the merits of that type of claim. *See Porter*, 558 U.S. at 41 (to assess prejudice, court considers "the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the habeas proceeding").

The problem is particularly pronounced when the procedural default follows from state habeas counsel's own failure to investigate. In *Martinez*, this Court held that a *Wiggins* claim can be considered on the merits in a federal habeas proceeding where the default is caused by state habeas counsel's deficient performance. *See* 132 S. Ct. at 1320. But a defaulted *Wiggins* claim necessarily involves an undeveloped record. When trial and state post-conviction counsel are each inadequate, both state court proceedings will fail to produce the fact development necessary to demonstrate a meritorious claim. A petitioner like Mr. Ayestas will thus arrive in federal court without

ever having had the opportunity to develop factual support for the issue that requires § 3599(f) services. *See, e.g.*, *Martinez*, 132 S. Ct. at 1317 ("To present [an IATC claim] at trial in accordance with the State's procedures, ... a prisoner likely needs an effective [state post-conviction] attorney.").

The substantial need test penalizes IATC claimants for the very deficiencies that *Martinez* is meant to address. The Fifth Circuit's rule rests on the assumption that federal habeas claimants leave state court with detailed evidence sufficient to substantiate their claims. As *Martinez* recognizes, however, that assumption is sometimes incorrect—a claimant like Mr. Ayestas may lack substantiation for his IATC claim when he arrives in federal court not because the claim is meritless, but because he has never had effective counsel to explore it. *Id.* at 1315; *see id.* at 1318 ("[T]he initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.").

Section 3599(f) does not require courts to authorize every *Wiggins* investigation. Where a request to conduct a prejudice investigation is not tied to credible allegations of deficient performance, for example, a § 3599(f) motion may be denied. In this case, however, the § 3599(f) motion cannot be denied for want of deficiency—the factual issues relevant to deficiency are contested, and the Fifth Circuit's holding assumed, correctly, that trial counsel was deficient.

The Fifth Circuit's decision in this case exhibits virtually every problem that arises when courts apply the substantial need test to procedurally defaulted *Wiggins* claims. Congress enacted § 3599(f) to improve the representations of capital litigants, and thus confidence in the constitutionality of the judgments supporting execution. The substantial need test comprehensively conflicts with that regime and should be rejected.

CONCLUSION

The judgment for the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX A

U.S. CONST. AMEND. VI

Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY APPENDIX B

U.S. CONST. AMEND. XIV

Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

....

STATUTORY APPENDIX C

18 U.S.C. § 3599

Counsel for Financially Unable Defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either-

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post-conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the

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(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the

prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connec-

tion with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

RECORD AND BRIEFS.

No. 16-6795

In the Supreme Court of the United States

CARLOS MANUEL AYESTAS, PETITIONER

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether this Court has Article III jurisdiction to review a district judge's denial of investigative funding, under 18 U.S.C. § 3599(f), when such determinations are administrative, non-judicial functions without adversarial proceedings on the issue and can be revised outside the traditional judicial hierarchy.

2.a. Whether it is ever "reasonably necessary," 18 U.S.C. § 3599(f), to grant investigative funding for federal habeas counsel to obtain evidence outside the state-court record regarding trial counsel's performance when that evidence pertains to "an ineffective-assistance-of-counsel claim that state habeas counsel forfeited," Pet. Br. i, and when the federal-habeas court is therefore barred from considering that new evidence under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e)(2).

2.b. Whether the Fifth Circuit's "substantial need" formulation of the "reasonably necessary" standard, 18 U.S.C. § 3599(f), is proper for federal-habeas cases, particularly for "an ineffective-assistance-of-counsel claim that state habeas counsel forfeited," Pet. Br. i, when AEDPA and this Court's precedent require an underlying claim to be "substantial" to get further federal-habeas review.

TABLE OF CONTENTS

Page

Jurisdiction 1

Statement 1

A. Factual background, trial, and appeal 1

B. State-habeas proceedings 6

C. Federal-habeas proceedings 8

Summary of argument 15

Argument 18

I. The Court lacks jurisdiction because the denial of 18 U.S.C. § 3599(f) funding is not an exercise of Article III judicial power 18

A. Article III jurisdiction does not exist to review the acts of judges performing administrative functions 18

1. Administrative acts occur in a non-adversarial context. 19

2. Administrative acts can be revised outside the judicial hierarchy. 21

B. Section 3599(f) funding determinations are administrative, non-judicial functions performed by judges. 22

C. Petitioner's arguments for jurisdiction are not persuasive 28

II. For defaulted claims of ineffective assistance of counsel, it is never "reasonably necessary" under § 3599(f) to pursue evidence regarding trial counsel's performance that is outside the state-court record, because AEDPA bars its consideration 32

A. If evidence regarding trial counsel's performance is not in the state-court record, 28 U.S.C. § 2254(e)(2) bars its consideration in deciding a procedurally defaulted ineffective-assistance-of-counsel claim. 33

B. *Martinez v. Ryan*'s equitable exception to the procedural-default rule has no bearing on AEDPA's independent bar on consideration of new evidence 39

III. The Fifth Circuit uses a proper standard for assessing § 3599(f) funding requests in habeas cases, and petitioner's funding request was properly denied. 44

A. "Substantial need" is a permissible formulation of § 3599(f)'s standard in habeas cases. 44

B. Petitioner's request for investigative funding was properly denied. 51

Conclusion 58

Statutory appendix 1a

TABLE OF AUTHORITIES

Cases:

Ake v. Oklahoma,
470 U.S. 68 (1985) 26

Ariz. Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011) 29

Atkins v. Virginia,
536 U.S. 304 (2002) 7

Autry v. McKaskle,
727 F.2d 358 (5th Cir. 1984) 9

In re Boston Herald, Inc.,
321 F.3d 174 (1st Cir. 2003) 18

Bradshaw v. Richey,
546 U.S. 74 (2005) 34
Brenner v. Manson,
383 U.S. 519 (1966) 27
Brown v. Stephens,
762 F.3d 454 (5th Cir. 2014) 47, 48
Burris v. Parke,
130 F.3d 782 (7th Cir. 1997) 46, 49
Calderon v. U.S. Dist. Ct. for the N. Dist. of Cal.,
98 F.3d 1102 (9th Cir. 1996) 50
Canales v. Stephens,
765 F.3d 551 (5th Cir. 2014) 43
Cannon v. Gibson,
259 F.3d 1253 (10th Cir. 2001) 56
Christeson v. Roper,
135 S. Ct. 891 (2015) 29
City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 41
Clark v. Johnson,
202 F.3d 760 (5th Cir. 2000) 47
Coleman v. Thompson,
501 U.S. 722 (1991) 40, 41
Cullen v. Pinholster,
563 U.S. 170 (2011) 33, 45, 54
Davila v. Davis,
137 S. Ct. 2058 (2017) 35, 38, 41, 43
Dickens v. Ryan,
740 F.3d 1302 (9th Cir. 2014) 43
Engle v. Isaac,
456 U.S. 107 (1982) 43
Flast v. Cohen,
392 U.S. 83 (1968) 19

Foley v. White,
835 F.3d 561 (6th Cir. 2016) 49
Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 19
Freytag v. Comm'r,
501 U.S. 868 (1991) 19, 25
Fuller v. Johnson,
114 F.3d 491 (5th Cir. 1997) 23, 47
Haight v. Parker,
No. 3:02-cv-00206, 2010 WL 1489979
(W.D. Ky. Apr. 13, 2010) 22
Harbison v. Bell,
556 U.S. 180 (2009) 29
Harrington v. Richter,
562 U.S. 86 (2011) 56, 57
Hayburn's Case,
2 U.S. (2 Dall.) 409 (1792) 19, 20, 25
Hohn v. United States,
524 U.S. 236 (1998) 18, 21, 24, 26
Holland v. Jackson,
542 U.S. 649 (2004) ..... *passim*
Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 38, 41, 42, 43
Keller v. Potomac Elec. Power Co.,
261 U.S. 428 (1923) 25
Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 42
King v. Westbrooks,
847 F.3d 788 (6th Cir. 2017) 39
Kingdomware Techs., Inc. v. United States,
136 S. Ct. 1969 (2016) 45

Lance v. Coffman,
549 U.S. 437 (2007) 18
Leonard v. Davis,
No. 2:17-cv-00796, 2017 WL 1508244
(E.D. Cal. Apr. 27, 2017) 22
Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 28, 31
Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 29, 31
Martel v. Clair,
565 U.S. 648 (2012) 26, 29, 48
Martinez v. Ryan,
566 U.S. 1 (2012) ..... *passim*
Matthews v. White,
807 F.3d 756 (6th Cir. 2015) 47
Microsoft Corp. v. Baker,
137 S. Ct. 1702 (2017) 19
Miles v. Ryan,
713 F.3d 477 (9th Cir. 2013) 39
Miller v. French,
530 U.S. 327 (2000) 25, 41
Muhammad v. Kelly,
575 F.3d 359 (4th Cir. 2009) 49
Murray's Lessee v. Hoboken Land & Improvement Co.,
59 U.S. (18 How.) 272 (1855) 20
Muskrat v. United States,
219 U.S. 346 (1911) 23
New Haven Inclusion Cases,
399 U.S. 392 (1970) 53
Nixon v. Epps,
405 F.3d 318 (5th Cir. 2005) 9

Old Colony Trust Co. v. Comm'r,
279 U.S. 716 (1929) 29, 31
Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 21, 25
Pope v. United States,
323 U.S. 1 (1944) 18
Postum Cereal Co. v. Cal. Fig Nut Co.,
272 U.S. 693 (1927) 19, 21, 25
Powell v. State of Ala.,
287 U.S. 45 (1932) 29, 30
Rhines v. Weber,
544 U.S. 269 (2005) 48
Riley v. Dretke,
362 F.3d 302 (5th Cir. 2004) 47
Riley v. Taylor,
277 F.3d 261 (3d Cir. 2001) 49
Rojem v. Workman,
655 F.3d 1199 (10th Cir. 2011) 27
Rompilla v. Beard,
545 U.S. 374 (2005) 52
Schriro v. Landrigan,
550 U.S. 465 (2007) 33, 48, 54
Sellers v. Ward,
135 F.3d 1333 (10th Cir. 1998) 37
Slack v. McDaniel,
529 U.S. 473 (2000) 46
Sonnier v. State,
913 S.W.2d 511 (Tex. Crim. App. 1995) 8
Stern v. Marshall,
564 U.S. 462 (2011) 20
Thomas v. Union Carbide Agric. Prods. Co.,
473 U.S. 568 (1985) 20

Trevino v. Thaler,
133 S. Ct. 1911 (2013) 10, 36
Tutun v. United States,
270 U.S. 568 (1926) 18
United States v. Bah,
574 F.3d 106 (2d Cir. 2009) 26
United States v. D'Andrea,
612 F.2d 1386 (7th Cir. 1980) 26
United States v. Dillon,
346 F.2d 633 (9th Cir. 1965) 29
United States v. Durant,
545 F.2d 823 (2d Cir. 1976) 51
United States v. Ferreira,
54 U.S. (13 How.) 40 (1851) ..... *passim*
United States v. French,
556 F.3d 1091 (10th Cir. 2009) 27
United States v. Gast,
297 F. Supp. 620 (D. Del. 1969) 25
United States v. Gonzales,
150 F.3d 1246 (10th Cir. 1998) 18, 28
United States v. Hunter,
385 F. Supp. 358 (D.D.C. 1974) 25
United States v. Johnson,
391 F.3d 946 (8th Cir. 2004) 26
United States v. Naples,
266 F. Supp. 608 (D.D.C. 1967) 25
United States v. Olano,
507 U.S. 725 (1993) 45
United States v. Patterson,
724 F.2d 1128 (5th Cir. 1984) 51
United States v. Roman,
121 F.3d 136 (3d Cir. 1997) 26

United States v. Schultz,
431 F.2d 907 (8th Cir. 1970) 51
Waldrop v. Jones,
77 F.3d 1308 (11th Cir. 1996) 56
Ward v. Hall,
592 F.3d 1144 (11th Cir. 2010) 39
Ward v. Stephens,
777 F.3d 250 (5th Cir. 2015) 37
Washington v. Strickland,
466 U.S. 668 (1984) 36
In re Webster,
605 F.3d 256 (5th Cir. 2010) 37
Wiggins v. Smith,
539 U.S. 510 (2003) 7, 52
Williams v. Norris,
576 F.3d 850 (8th Cir. 2009) 39
Williams v. Taylor,
529 U.S. 420 (2000) ..... *passim*
Williams v. Trammell,
782 F.3d 1184 (10th Cir. 2015) 39
Wright v. Angelone,
151 F.3d 151 (4th Cir. 1998) 47

Statutes and rules:
18 U.S.C.:
§ 3006A(e)(3) 24
§ 3006A(i) 25
§ 3599(f) ..... *passim*
§ 3599(g)(2) 24
21 U.S.C. § 848(q) 50

28 U.S.C.:
§ 1254 28
§ 1291 ..... 26, 28
§ 1292(a)-(b) 26
§ 2244(b)(2)(B)(ii) 37
§ 2253(c) 45
§ 2254(a) 33, 44
§ 2254(b) 33
§ 2254(d) 33, 45
§ 2254(d)(1) 38, 45, 54
§ 2254(d)(2) 38
§ 2254(e) 33
§ 2254(e)(1) 38, 45
§ 2254(e)(2) ..... *passim*
§ 2254(e)(2)(A)(i) 34, 36
§ 2254(e)(2)(A)(ii) 34, 36
§ 2254(e)(2)(B) 34, 37
§ 2255(h)(1) 37
Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) 31, 45
District of Columbia Legal Aid Act, Pub. L. No. 86-531, 74 Stat. 229 (1960) 30
Pub. L. No. 81-790, 64 Stat. 866 (1950) 24
Pub. L. No. 74-449, 49 Stat. 1140 (1936) 24
Tex. Code Crim. Proc.:
art. 11.071, § 5(a)(1) 35
art. 11.071, § 5(e) 35
art. 37.071, § 2 ..... 5, 56
Fed. R. Civ. P. 11 50
Fed. R. Crim. P. 44 29

Miscellaneous:

Francis A. Allen, *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (Feb. 25, 1963) 30

Emanuel Celler, *Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 Minn. L. Rev. 697 (1961) 30

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§§ 660.10.10-.20, https://perma.cc/37L7-USYZ 46
Appendix 2A, https://perma.cc/WR57-ADQS 23
Appendix 3A, https://perma.cc/LA9A-V73J 24

Robert J. Kutak, *Criminal Justice Act of 1964*, 44 Neb. L. Rev. 703 (1965) 24

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Subcomm. on Constitutional Rights, S. Comm. on the Judiciary, *The Criminal Justice Act in the Federal District Courts*, 90th Cong. (Comm. Print 1968) 25

Tr. of Feb. 3, 2016 Mtg. of the Ad Hoc Comm. to Review the CJA, https://perma.cc/B5CJ-NXPY 28

Tr. of Mar. 2, 2016 Mtg. of the Ad Hoc Comm. to Review the CJA, https://perma.cc/S2MA-A8AN 28

United States Judicial Conference, *Report of the Committee to Review the Criminal Justice Act* (Jan. 29, 1993), https://perma.cc/6JEB-JRAH 27, 28, 29

15A Charles A. Wright et al., *Federal Practice and Procedure* (2d. ed. 1992) 27

JURISDICTION

As explained *infra*, Part I, the Court lacks jurisdiction to review the district judge's denial of petitioner's request for investigative funding.

STATEMENT

A. Factual Background, Trial, and Appeal

1. In the summer of 1995, Elin Paneque stopped by his home in Houston for lunch. J.A. 118. He found it ransacked and his 67-year-old mother, Santiaga Paneque, dead in the bathroom, surrounded by blood and vomit. J.A. 119, 128, 353. Duct tape encircled her neck, covered her eyes, and bound her ankles and wrists. J.A. 119. She had been beaten severely, leaving broken bones in her elbow, neck, and face. J.A. 127-28, 354. A medical examination showed that she had been strangled to death, which required someone to squeeze her neck for three to six minutes. J.A. 354.

Petitioner and two others, Federico Zaldivar and Roberto Meza, were arrested for the crime. J.A. 37, 115 n.1, 161. Petitioner was charged with capital murder. J.A. 161.

2. Diana Olvera and Connie Williams represented petitioner in trial court. J.A. 161. Olvera filed a motion to appoint investigator John Castillo to assist with trial preparation. R.1392-93.[1] The trial court granted the motion and authorized payment for the investigative services. R.1394-95.

Castillo's records indicate that he interviewed petitioner several times beginning in February 1996, subpoenaed psychological and disciplinary records, made multiple attempts to contact petitioner's family in Hon-

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[1] R.*p* refers to the record on appeal in the Fifth Circuit.

duras (petitioner's home country), contacted several potential witnesses, searched for criminal histories of inmates who might testify against petitioner, and attempted to obtain deportation records and California prison records for petitioner. R.878-80, 1407-09. Olvera's records indicate that she made multiple phone calls to petitioner's family in Honduras, obtained Harris County jail records documenting infractions by petitioner (fighting and possession of home-made intoxicants), and learned that California had "no disciplinary records" for petitioner. R.874-76.

As found in petitioner's state-habeas proceedings, his trial counsel's efforts to investigate mitigating evidence were hampered by petitioner's refusal to allow contact with his family in Honduras. J.A. 170-71. According to Olvera, she had numerous conversations with petitioner about his family, and he continuously stated that he did not want them contacted. J.A. 149, 170-71. Shortly before trial, petitioner relented, and Olvera and Castillo began reaching out to petitioner's family. J.A. 149-50, 171-72. Castillo sent a letter on May 29, 1997, and Olvera followed up with a letter on June 10. J.A. 149, 171. Olvera also spoke with several of petitioner's family members by phone. On June 25, petitioner's sister indicated that it would be difficult to leave Honduras due to their father's illness and for economic reasons, and, on June 26, petitioner's mother did not appear concerned for her son and seemed evasive in her responses. J.A. 150, 172-73.

Olvera also contacted the Honduran Consulate and informed them of petitioner's situation. J.A. 151, 173. After determining that the Consulate would be unable to assist in securing the presence of petitioner's family at trial, Olvera contacted the American Embassy in Honduras. J.A. 149-51, 173. She faxed a letter to the

embassy on July 2 and attempted to set up a meeting at the embassy for petitioner's family on July 3. J.A. 149-50, 171-72. Ultimately, however, no family member was able to make the trip to Houston for petitioner's trial.

3. The guilt phase of petitioner's trial took place on July 8 and 9, 1997. The prosecution linked petitioner to Paneque's death in several ways.

First, petitioner's fingerprint and palm print were found on the duct tape wrapped around Paneque's ankles. J.A. 121. Petitioner's fingerprints were also found on a roll of duct tape left in the bathroom. J.A. 121.

Second, a neighbor testified that petitioner had been to Paneque's house approximately two weeks before the murder, ostensibly to look at furniture. J.A. 117-18.

Third, petitioner admitted his involvement in the murder approximately two weeks later while he and his accomplices were staying at a home in Louisiana. J.A. 121-22. The homeowner's brother, Henry Nuila, testified that petitioner, while intoxicated, told Nuila that he had killed a woman in Houston and that he wanted to kill his two accomplices because "they had spoken too much." J.A. 122, 163. Petitioner brandished a gun and threatened to kill Nuila if Nuila did not help petitioner kill his accomplices. J.A. 122. Nuila subsequently called the police, who promptly arrested petitioner and his two accomplices.[2] J.A. 122.

In his defense, petitioner's counsel challenged the medical examiner's report of strangulation and the fingerprint identification. *E.g.*, R.4395-98, 4433-42. Coun-

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[2] In the state-habeas proceedings, the prosecutors stated that they also intended to have Zaldivar testify against petitioner. R.5521, 5524. Due to Zaldivar's fear of petitioner, however, they ultimately decided not to call him. R.5521.

sel also questioned the veracity of Nuila's statement, suggesting that his in-court testimony differed from what he told the police on the day of the arrest. R.4189-90. In closing, counsel argued that there was insufficient evidence that petitioner caused or intended to cause Paneque's death. R.4483-86, 4491.

The jury voted unanimously to convict petitioner of capital murder. J.A. 58.

4. During the punishment phase on July 10, 1997, the State established petitioner's ongoing violent propensities. Three days after he murdered Paneque, petitioner forced two victims into a hotel bathroom at gunpoint, threatening to kill them. J.A. 127. Petitioner eventually relented but stole a victim's truck and threatened to kill his family if he went to the police. J.A. 127.

The prosecution also showed that petitioner had a criminal history. One prior conviction was for misdemeanor theft; when petitioner was arrested for that crime, he denied having any health, drug, or alcohol problems. R.4595, 4597, 4608, 5137. Another prior conviction from California was for burglary and a drug-dealing offense, crimes for which petitioner served two years in prison after violating probation from an initially suspended sentence. R.4609. Petitioner was also wanted for illegal transportation of aliens. R.4610, 5199. The prosecution filed a pretrial notice of an intent to present evidence of other extraneous offenses, such as a 1991 drunk-driving incident and several prison infractions, but ultimately did not present those facts to the jury. R.1598-1601.

In mitigation, petitioner's trial counsel presented three letters from a Houston Community College System instructor, stating that petitioner was enrolled in an English-as-a-Second-Language course in the Harris

County jail. J.A. 41-43. The instructor asserted that petitioner was a serious and attentive student. J.A. 41-43.

Petitioner's trial counsel tried to show that he had no criminal history in Honduras using documents that his family had mailed to petitioner and were received by counsel that morning. R.4708-14. But the documents referred to "Denys Humberto Zelaya Corea," R.4709, and only petitioner was in a position to testify that he was known by that name, R.4710; *see* Pet. Br. 10 n.2. The rules of evidence would allow cross-examination of petitioner on any relevant topic if he testified about his history in Honduras, and his counsel did not want to expose him to cross-examination. R.4710-12.

The jury determined that (1) there was a probability that petitioner would commit criminal acts of violence constituting a continuing threat to society; (2) petitioner caused or intended the death of Santiaga Paneque; and (3) there were not sufficient mitigating circumstances to warrant a sentence of only life imprisonment. J.A. 67-69; *see* Tex. Code Crim. Proc. art. 37.071, § 2. The trial court therefore sentenced petitioner to death. J.A. 74-75.

5. Petitioner's counsel for his direct appeal to the Texas Court of Criminal Appeals was Loretta Muldrow. R.1256. She raised eleven arguments, including insufficient evidence at the guilt and punishment stages, the constitutionality of Texas's death-penalty procedures, and objections to evidence at the guilt and punishment stages. R.1256-1316. The Court of Criminal Appeals affirmed the conviction and sentence. J.A. 115-38.

B. State-Habeas Proceedings

1. J. Gary Hart and Robin Norris represented petitioner in his state-habeas proceedings. R.706, 5268.

In 1998, these counsel met with, interviewed, and obtained affidavits from petitioner's mother and two of his sisters who had traveled to Houston from Honduras. R.699; J.A. 85-114. They described petitioner's "stable, middle class background" in which his mother and father had no marital problems and ran a small business in Honduras. J.A. 90-91, 100-101, 110-11. They also stated that petitioner had no major injuries or illnesses, no discernable learning disorders, and no past trouble with the law. J.A. 91-92, 101, 111. Instead, he received above average grades and attended church. J.A. 91-92, 101, 111.

Counsel also filed investigative-funding motions on numerous issues, including alcoholism. R.725-42. State-habeas counsel ultimately hired Tena Francis to conduct an investigation into both guilt and punishment issues. R.702; J.A. 76-84. With respect to punishment, she recommended obtaining a full social history, including information on petitioner's family, character, life experiences, possible mental illness, substance abuse, education, and possible physical and psychological trauma. J.A. 81-82; *see* J.A. 82 (estimating investigation would take 200 hours). Regarding substance abuse, Francis recommended interviewing petitioner and the individuals with whom petitioner was staying in Louisiana around the time of the murder. J.A. 83. Francis assigned the investigation to Gerald Bierbaum, who met with witnesses in Louisiana, various jurors, and petitioner's accomplices. R.700.

On December 9, 1998, eleven months after being appointed, counsel filed a state-habeas petition with ten

ineffective-assistance-of-trial-counsel (trial-IAC) issues and six other constitutional claims. R.5270-73. As relevant here, petitioner raised a trial-IAC claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), arguing insufficient mitigation investigation based on the absence of testimony from petitioner's Honduran family at the punishment stage. R.5294-5301.[3]

In 2003, following *Atkins v. Virginia*, 536 U.S. 304 (2002), state-habeas counsel had a psychologist examine petitioner. J.A. 139-40. The psychologist found that petitioner's IQ was in the "high average range" and that there was "no evidence of mental retardation." J.A. 139-40. He noted, however, some concerns regarding petitioner's "psychological pattern" and that petitioner was "developing some delusional thinking." J.A. 140. Counsel filed the psychologist's findings in state court but redacted the portion about developing mental-health issues. R.5582. This redaction apparently reflected habeas counsel's strategic use of the letter to support an argument that trial counsel should have had petitioner testify in the guilt phase of his trial. R.5558.

2. In 2008, the state district court recommended rejecting all of petitioner's claims, and the Texas Court of Criminal Appeals adopted all relevant findings and conclusions. J.A. 161-200. With respect to trial counsel's failure to obtain the testimony of petitioner's family, the court found that "trial counsel made reasonable, diligent efforts to secure the attendance of the [petitioner]'s family at [petitioner]'s trial, notwithstanding [peti-

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[3] Petitioner wrongly states that federal-habeas counsel was the first to raise a *Wiggins* claim. Pet. Br. 18. State-habeas counsel raised and briefed *Wiggins* in the habeas reply and request for findings of fact and conclusions of law. R.5561, 5719-23, 5767-69.

tioner]'s initial decision not to have his family contacted." J.A. 174. The court ultimately held that trial counsel could not be deemed ineffective for following petitioner's wishes not to contact his family. J.A. 190 (citing *Sonnier v. State*, 913 S.W.2d 511, 522 (Tex. Crim. App. 1995)).

C. Federal-Habeas Proceedings

1. In 2009, after obtaining new counsel, petitioner filed a federal-habeas petition. R.8-67. The petition included a *Wiggins* trial-IAC claim regarding mitigation evidence, five trial-IAC claims regarding the guilt phase, and multiple other constitutional claims. R.8-67.

Petitioner's *Wiggins* claim urged that trial counsel was ineffective by failing to investigate and present evidence of (1) petitioner's good character traits, (2) his kindness and reputation for helping the less fortunate, (3) his lack of criminal history in Honduras, (4) the "bad influence" of his accomplice Zaldivar, and (5) his schizophrenia, alcoholism, and drug use. R.14-15. The first four points were based primarily on the affidavits of petitioner's family that had been obtained by state-habeas counsel and included in the state-habeas record. R.206-09, 282-305. For the fifth point, petitioner referenced his Texas Department of Criminal Justice (TDCJ) prison medical records from 2000 and later. R.28-29. But those medical records were not part of the state-court record and were not filed in any court until after the federal-habeas case was remanded in 2014 (as described below). R.485 n.3.

Sixteen months after filing his federal-habeas petition, petitioner filed a motion under 18 U.S.C. § 3599(f), seeking funding to investigate new mitigation evidence outside the state-court record. R.479-90. Petitioner sought funding for an investigator to travel to Hondu-

ras and interview his family and friends, as well as continue an investigation into his acquaintances in Houston, regarding all of the issues raised in his *Wiggins* trial-IAC claim. R.480.

2. The federal district court denied petitioner's habeas petition. J.A. 237. Regarding petitioner's *Wiggins* claim, the district court concluded that petitioner's substance-abuse and mental-illness allegations were unexhausted and procedurally barred in state court. J.A. 210-15. As to the other *Wiggins* arguments (regarding evidence from his Honduran family), the district court agreed with the state courts that petitioner had not demonstrated deficient performance. J.A. 219-20. The court noted that trial counsel was not ineffective for following petitioner's instructions and acted promptly once petitioner allowed his counsel to contact his family. J.A. 219-20 (citing, inter alia, *Nixon v. Epps*, 405 F.3d 318, 325-26 (5th Cir. 2005), and *Autry v. McKaskle*, 727 F.2d 358, 362 (5th Cir. 1984)).

The court also denied the request for § 3599(f) investigative funding, reasoning that (1) the underlying *Wiggins* claim was meritless because trial counsel had not been ineffective in failing to contact petitioner's family based on petitioner's instructions, and (2) the evidence sought would merely supplement what was already presented to the state-habeas court. J.A. 235-37. The district court denied a certificate of appealability (COA) on all issues. J.A. 233-35.

3. The Fifth Circuit denied petitioner's request for a COA. J.A. 242. Regarding trial counsel's alleged delay in contacting petitioner's Honduran family, the Fifth Circuit applied AEDPA's standard and held that the state court's resolution was "not unreasonable." J.A. 252. The Fifth Circuit also agreed that petitioner did

not show cause for procedurally defaulting his other *Wiggins* trial-IAC claims in state habeas. J.A. 255-56.

4. Petitioner sought certiorari, arguing that *Martinez v. Ryan*, 566 U.S. 1 (2012), allowed him to demonstrate cause for the procedural default of his *Wiggins* trial-IAC claims by showing that state-habeas counsel was ineffective. Shortly thereafter, *Trevino v. Thaler* held that the ineffectiveness of state-habeas counsel can provide cause to overcome a procedural default of a trial-IAC claim under the Texas habeas system. 133 S. Ct. 1911, 1921 (2013). Accordingly, this Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded in light of *Trevino*. J.A. 259. The Fifth Circuit, in turn, remanded the case to the district court for consideration of petitioner's "procedurally defaulted ineffective assistance of counsel claims"—that is, his *Wiggins* trial-IAC claims regarding mental-illness and substance-abuse issues. J.A. 263.

5. On remand, petitioner offered numerous exhibits, many of which were not part of the state record. R.647-881. Petitioner included several affidavits and records from state-habeas investigators Francis and Bierbaum. R.699-704, 714-50, 754-58. Neither noted observing any mental-illness symptoms. R.699-700, 702-04. The only mention of mental illness was in an affidavit created belatedly in 2014, in which Francis stated merely that drug addiction can injure the brain and a "high rate of comorbidity" exists between substance abuse and mental illness. R.704. Similarly, Francis's investigation plan—which is not in the state record and was first introduced in federal habeas—failed to identify any specific evidence that petitioner suffered from a mental illness. R.717-21.

Petitioner's briefing on remand also included updated affidavits from his mother and two sisters. The affi-

davits from his sisters, signed in 2010, are in tension with their earlier descriptions of petitioner's stable background, as these updated affidavits assert that petitioner's father had 22 children with different mothers and had killed a neighbor. R.851-52, 860, 863. None of the new affidavits mention any signs of mental illness, and only one—signed by petitioner's mother in 2014—references alcohol by explaining merely that she suspected petitioner of drinking at age 16. R.870.

For the first time, petitioner referenced an "investigation report" prepared by Castillo (petitioner's trial investigator). R.687-88. The report itself, however, was not introduced into evidence. R.687 n.18 (stating that the report contains extensive confidential work product). According to petitioner, the report states that petitioner sustained several head injuries in the past—one while playing soccer and one from a motorcycle accident—and had headaches. R.687-88. Petitioner contended that the report also stated that petitioner had a head x-ray following a car accident in Houston. R.688. Further, petitioner alleged that the report indicated that petitioner drank frequently, used cocaine, and was using alcohol and cocaine at the time of the murder. R.688. Because the report is not in the record, respondent cannot confirm these statements, explain their context, or fully present argument on whether that information should have triggered further investigation.

Petitioner also, for the first time, filed medical records from his time in prison showing that he had been diagnosed in 2003 as schizophrenic and stating that petitioner had abused alcohol for fourteen years and cocaine for one year. R.770-71; J.A. 141-46. Petitioner also included the unredacted version of the letter from the psychologist who examined him in 2003. J.A. 139-40.

In response, respondent argued that petitioner failed to show that trial counsel or habeas counsel was ineffective. R.892-98. Respondent also argued that AEDPA, 28 U.S.C. § 2254(e)(2), barred the district court from considering any evidence outside the state record. R.904-09.

6. On November 3, 2014—six years after state-habeas proceedings were completed, five years after petitioner filed his federal-habeas petition, and after remand briefing was finished—petitioner filed an ex parte, sealed motion for investigative funding under 18 U.S.C. § 3599(f). J.A. 271-340.

Petitioner sought funding to perform a full social-history investigation supporting his allegation that "trial counsel failed to investigate, in the comprehensive manner required by prevailing professional norms, [petitioner]'s social, medical, and psychological history." J.A. 272; *see* J.A. 277 (stating that federal-habeas counsel sought interviews of "'virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors,' and so forth.").[4]

7. The district court denied petitioner's federal-habeas petition, ruling that he failed to establish cause

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[4] The investigator whom petitioner sought to hire had already spent two weeks in Honduras and obtained affidavits from 13 individuals, including petitioner's family members. J.A. 301-03. The investigator, however, asserted a need to interview people who knew petitioner in Mexico and California, where petitioner spent significant time. J.A. 307-11. Her list of potential witnesses includes friends, coworkers, a girlfriend, petitioner's son, two drug dealers, and the girlfriends of the drug dealers. J.A. 310-11. Petitioner's counsel anticipated returning to the court, after the social history was compiled, for additional funding for experts to analyze the evidence gathered. J.A. 287.

and prejudice to excuse the procedural default of his *Wiggins* trial-IAC claims regarding mental-illness and substance-abuse issues. J.A. 352. First, the court reasoned that trial counsel had no reason to investigate petitioner's mental health. J.A. 360-61. The evidence that petitioner relied on to show mental illness did not exist until years after his conviction. J.A. 360-61. Next, the district court recognized that state-habeas counsel had retained two investigators who looked into numerous issues and were aware of petitioner's substance abuse. J.A. 361. State-habeas counsel also had petitioner examined by a psychologist. J.A. 361. The court determined that habeas counsel's performance was not deficient. J.A. 361. The court also concluded that, given the brutal nature of the crime and petitioner's substantial history of criminal violence, it was "highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding." J.A. 361-62.

The district judge also denied petitioner's § 3599(f) investigative-funding request, recognizing that (1) petitioner failed to show trial counsel was deficient, (2) there was no reasonable probability that evidence of substance abuse would have changed the outcome of the state-court proceedings, and (3) state-habeas counsel was not ineffective. J.A. 363.

8. The Fifth Circuit affirmed the denial of § 3599(f) investigative funding. J.A. 390. The court noted its prior statements that funding is available if "the district court finds that there is a 'substantial need' for such services to pursue a claim that is not procedurally barred." J.A. 385. The court also explained that funding requires a "viable constitutional claim, not a meritless one," and that the search cannot be for "evidence that is supplemental to evidence already presented." J.A. 385.

The court noted that there were no medical records indicating that petitioner had a mental illness until 2000 —three years after petitioner's conviction. J.A. 388. The court concluded that it was not ineffective to fail to pursue what appeared to be an unproductive line of inquiry. J.A. 389. The court also stated that it was, "at best ... conceivable, but not substantially likely" that evidence of mental illness would have altered the outcome, and "highly unlikely" that evidence of substance abuse would have altered it either. J.A. 389. The court further held that, because there was no reason to hold that trial counsel was ineffective, there could also be no reason to find state-habeas counsel ineffective for failing to raise these trial-IAC claims. J.A. 390.

Petitioner noted in a rehearing petition that the court incorrectly stated that trial counsel (as opposed to state-habeas counsel) directed a psychological exam. J.A. 399. The court acknowledged the error, concluding that it did not change the court's decision. J.A. 399.

9. This Court granted certiorari limited to the question regarding 18 U.S.C. § 3599(f) investigative funding. J.A. 400.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to review the district judge's denial of investigative funding under 18 U.S.C. § 3599(f) because that denial is an *administrative* function and not an exercise of Article III judicial power. This Court has identified two key hallmarks of administrative acts performed by judges: (1) there is no adversary proceeding on the issue, and (2) the act can be revised outside the traditional Article III judicial hierarchy.

Section 3599(f) funding determinations have both characteristics. These determinations (1) often are made ex parte after a sealed filing with a district judge, as here, and (2) can be revised by either a single circuit judge or the Administrative Office of the United States Courts. Thus, circuit courts considering the question have uniformly held that funding determinations pursuant to the Criminal Justice Act (CJA)—which includes § 3599(f)—are unappealable administrative actions rather than exercises of Article III judicial power. Indeed, judges have advocated placing this benefits-granting duty with other officials.

II. Even if appellate jurisdiction exists, AEDPA bars federal courts, in addressing procedurally defaulted trial-IAC claims, from considering evidence regarding trial counsel's performance outside the state-court record. It cannot be "reasonably necessary," 18 U.S.C. § 3599(f), for federal-habeas counsel to direct an investigation of new evidence of trial-IAC when that evidence cannot be considered by a federal court.

AEDPA generally bars federal-habeas courts from considering evidence not in the record of state-court proceedings. 28 U.S.C. § 2254(e)(2). There are three exclusions from this general rule, but none apply to proce-

durally defaulted trial-IAC claims. First, because such a claim was not raised in state court as required, the prisoner did not diligently attempt "to develop the factual basis of [that trial-IAC] claim in State court proceedings." *Id.* Second, a trial-IAC claim does not rely on a new, retroactive, and previously unavailable "rule of constitutional law." *Id.* Third, defaulted trial-IAC claims do not rest on "a factual predicate that could not have been previously discovered through the exercise of due diligence." *Id.* Only factual predicates that trial counsel *could* have discovered with diligence can underlie defaulted IAC claims.

Martinez v. Ryan did create a narrow equitable exception, as part of this Court's judicially developed rules regarding procedural default, under which state-habeas-IAC can be sufficient cause to allow consideration of an otherwise defaulted trial-IAC claim. However, § 2254(e)(2) is not about consideration of defaulted claims—the "narrow" context addressed in *Martinez*, 566 U.S. at 9—but rather the receipt of new evidence. When Congress directly addresses a situation through legislation like AEDPA, its statute controls. And, for federal courts' consideration of new evidence, Congress in § 2254(e)(2) deliberately "raised the bar" from the prior judicially developed standard. *Williams v. Taylor*, 529 U.S. 420, 433 (2000). This Court has already held that state-habeas counsel's lack of diligence is attributed to the prisoner for purposes of § 2254(e)(2), and statutory *stare decisis* applies to those holdings. *See infra* pp. 35-36 (quoting *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam); *Williams*, 529 U.S. at 437, 439-40). Thus, even when a prisoner invokes *Martinez*'s narrow procedural-default exception, § 2254(e)(2) still bars federal courts from considering

evidence regarding trial counsel's performance that is outside the state-court record.

III. In all events, the Fifth Circuit's "substantial need" formulation properly applies 18 U.S.C. § 3599(f)'s "reasonably necessary" standard for funding in the context of federal-habeas proceedings. Section 3599(f)'s standard must account for the constraints of the underlying proceedings. And AEDPA imposes many significant limits on federal-habeas proceedings. AEDPA and *Martinez* both require an underlying claim to be "substantial" to get further federal-habeas review. And the Fifth Circuit has not applied the "substantial need" formulation outside the habeas context.

Assuming appellate jurisdiction, the Fifth Circuit properly affirmed the denial of § 3599(f) funding. Some aspects of petitioner's motion seek to investigate claims that the courts have already rejected. And, on petitioner's mental-health and substance-abuse *Wiggins* trial-IAC claims, there was no constitutional obligation for trial counsel to perform investigations into either issue given the information trial counsel had at the time of trial. Nor could petitioner show a "substantial likelihood" that the jury would have given him a life sentence rather than the death penalty, given the brutality of the murder, petitioner's commission of a robbery at gunpoint three days later and threat to kill that victim's family if he went to the police, petitioner's admission that he wanted to kill his accomplices, his threat to kill a witness to his confession, and petitioner's criminal history that resulted in jail time after he violated probation.

ARGUMENT

I. The Court Lacks Jurisdiction Because the Denial of 18 U.S.C. § 3599(f) Funding Is Not an Exercise of Article III Judicial Power.

This Court lacks jurisdiction to review the denial of 18 U.S.C. § 3599(f) investigative funding, because such a denial is not an exercise of Article III "judicial Power." Rather, decisions about § 3599(f) funding are *administrative* functions that happen to be performed by judges. Those decisions bear the two key hallmarks of administrative acts, which are not appealable: They do not require adversarial proceedings, and they can be revised outside the Article III judicial hierarchy. The Court should therefore vacate the portion of the court of appeals' ruling regarding § 3599(f) funding and direct that this portion of the appeal be dismissed. *See Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam).

A. Article III jurisdiction does not exist to review the acts of judges performing administrative functions.

Not every act by a federal judge is appealable: "When judges perform administrative functions, their decisions are not subject to [this Court's] review." *Hohn v. United States*, 524 U.S. 236, 245 (1998); *see, e.g.*, *Pope v. United States*, 323 U.S. 1, 13-14 (1944); *Tutun v. United States*, 270 U.S. 568, 576 (1926); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 47 (1851). "Just as trial-related expenditures, reviews, requests, and approvals for funds in the Department of Justice and Federal Public Defender's Offices are administrative, not judicial, functions, so is the CJA . . . process." *United States v. Gonzales*, 150 F.3d 1246, 1254 (10th Cir. 1998); *accord, e.g.*, *In re Boston Herald, Inc.*, 321 F.3d 174,

185 (1st Cir. 2003) (analogizing the CJA to "government benefits programs").

The Court has articulated two key features that distinguish judicial from administrative functions performed by judges. First, judicial acts occur in an adversarial context. Second, judicial acts are not susceptible to revision outside the hierarchical process of judicial review. *See, e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 891 (1991); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 754-55 (1976); *Postum Cereal Co. v. Cal. Fig Nut Co.*, 272 U.S. 693, 699 (1927); *Ferreira*, 54 U.S. (13 How.) at 46-47.

1. Administrative acts occur in a nonadversarial context.

A "minimal condition[]" for an act to be considered an exercise of "judicial power" is that the "question" acted on be "presented in an adversary context." *Franks*, 424 U.S. at 754-55; *accord Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1716-17 (2017) (Thomas, J., concurring in the judgment) ("The 'judicial Power' of the United States extends only to . . . issues presented 'in an adversary context.'") (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). In contrast, deciding in a nonadversarial context whether an individual is entitled to a government benefit is a classic administrative function.

This distinction was recognized early in the Court's history. One example was recounted in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), which concerned the Invalid Pensions Act of 1792. In that Act, Congress instructed the circuit courts to review claims for pensions by Revolutionary War veterans. The Reporter's note accompanying *Hayburn's Case* describes the concern of Justices of this Court, then riding circuit, that the duty placed on them as judges exercising judicial power was uncon-

stitutional "[b]ecause the business directed by this act is not of a judicial nature." *Id.* at 411. But Chief Justice Jay and Justice Cushing had a solution: They adjourned court and then "regard[ed] themselves as being ... commissioners designated by the act" and "proceed[ed], as commissioners, to execute the business of this act in the same court room, or chamber." *Id.* at 414; *see also Ferreira*, 54 U.S. (13 How.) at 53.

Furthermore, even if a judge engages in "an inquiry into the existence of facts and the application to them of rules of law," that does not mean the judge is exercising the Article III judicial power. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1855). Rather, Article-III adverseness is required. As the Court in *Murray's Lessee* explained:

> [I]t is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, *controversies* ... within the meaning of the second section of the third article of the constitution.

Id. at 280-81 (emphasis added; internal citation omitted).[5]

The Court's reasoning in *Ferreira* is particularly instructive here. *Ferreira* dismissed an appeal by the

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[5] This is particularly true regarding government benefits provided by statute—like § 3599(f) investigative funding—which are quintessential "public rights." *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585-86 (1985). Public rights are often determined outside Article III proceedings. *See Stern v. Marshall*, 564 U.S. 462, 490 (2011); *Murray's Lessee*, 59 U.S. (18 How.) at 284; *Ferreira*, 54 U.S. (13 How.) at 47.

United States from a district judge's disposition of a claim for compensation brought to it under "[t]he treaty of 1819 by which Spain ceded Florida to the United States." 54 U.S. (13 How.) at 45. The Court held that because "all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain," "such a tribunal is not a judicial one." *Id.* at 46-47. Rather, the "authority conferred on the respective judges was *nothing more than that of a commissioner to adjust certain claims against the United States*; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided." *Id.* at 47 (emphasis added); *see Hohn*, 524 U.S. at 245.

2. Administrative acts can be revised outside the judicial hierarchy.

In addition to the requirement of an adversary context, a judge does not exercise judicial power if the act can be revised outside the Article III judicial hierarchy.

A judge administering a benefit program does not exercise Article-III power merely by granting preliminary approval that can be overridden outside of judicial "review . . . by superior courts in the Article III hierarchy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). In that scenario, "[i]n the exercise of such function," the district judge "does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution." *Postum Cereal Co.*, 272 U.S. at 699.

B. Section 3599(f) funding determinations are administrative, non-judicial functions performed by judges.

Section 3599(f) funding determinations are administrative functions performed by judges. These funding requests are often made ex parte, without requiring adversary presentation of the issues,[6] and are subject to revision outside the Article III judicial hierarchy by either a single circuit judge or the Administrative Office of the United States Courts. Circuit courts to consider this issue have uniformly held that decisions on funding requests under the CJA, such as § 3599(f) requests, are unappealable administrative actions.

1. A § 3599(f) funding determination is not made in the context of adversarial presentation of the issues and is not materially different from the nonjudicial action in *Ferreira*. As there, the § 3599(f) funding request here was "altogether *ex parte*," involving only petitioner and the district judge. 54 U.S. (13 How.) at 46; *see* J.A. 271-340.[7] "[A]ll that the judge [was] required to do" under

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[6] Ex parte proceedings are required upon "a proper showing [of] the need for confidentiality." 18 U.S.C. § 3599(f). Courts have interpreted this requirement such that ex parte proceedings are the norm. *See, e.g., Leonard v. Davis*, No. 2:17-cv-00796, 2017 WL 1508244, at *1 (E.D. Cal. Apr. 27, 2017) (stating that "the need for confidentiality is inherent" in such requests); *Haight v. Parker*, No. 3:02-cv-00206, 2010 WL 1489979, at *9 (W.D. Ky. Apr. 13, 2010) (observing that courts generally require, to proceed ex parte, only a "statement ... generically identify[ing] the type of services needed and the broad issue or topic (for example, innocence) for which the services are needed").

[7] In some cases, respondents are permitted to comment on § 3599 funding requests, but that does not make these requests adversarial in the Article III sense. To be adverse, as relevant to the exercise of judicial power, is to have one party "assert a ...

§ 3599(f) was "to receive the claim when the [petitioner] present[ed] it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain." *Ferreira*, 54 U.S. (13 How.) at 46.[8]

Respondent did not have access to any portion of petitioner's funding request until the parties agreed to include a redacted version of that request in the Joint Appendix, for this Court's ease of reference. Portions of petitioner's request still remain hidden from respondent's view. *See* J.A. 271-340. At its core, the dispute here regarding investigative funding is between petitioner and the district judge acting in an administrative role as claim processor—not between petitioner and respondent.

2. A § 3599(f) funding determination is properly deemed administrative because it also may be revised outside the traditional Article III judicial hierarchy.

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right . . . against" another for relief, "or to demand compensation for alleged wrongs," neither of which describe a § 3599 funding proceeding. *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (holding that the United States and the plaintiff were not adverse parties despite their dispute over the constitutionality of a statute). The parties are not "adverse" concerning funding requests, notwithstanding respondents' occasional opposition to them. *See, e.g.*, *Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir. 1997) (noting that, although the CJA funding proceeding was not ex parte, respondent was still "not a party in interest" to the funding determination).

[8] Notably, under the CJA, "[a] court may choose to have applications for investigative, expert, and other services considered by *a non-presiding judge*." 7 Judicial Conference of the United States, *Guide to Judiciary Policy*, Appendix 2A at 26, https://perma.cc/WR57-ADQS (emphasis added).

A single judge on the circuit court may override a district judge's approval of investigative funding.[9] *See* 18 U.S.C. § 3599(g)(2) (a district judge's approval of funds for investigative services in excess of $7,500, like those requested by petitioner, must be reviewed and ratified by the chief circuit judge or a circuit judge designated by the chief circuit judge); *accord id.* § 3006A(e)(3). That single circuit judge's review is also administrative, based solely on a memorandum from the district judge with no party involvement. *See* 7 Judicial Conference of the United States, *Guide to Judiciary Policy*, Appendix 3A, https://perma.cc/LA9A-V73J (sample request for certification).[10]

Moreover, "the Director [of the Administrative Office of the United States Courts] has occasionally taken

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[9] In *Hohn*, the Court concluded that a single circuit judge's resolution of a request for a certificate of appealability in federal-habeas cases was appealable to this Court. 524 U.S. at 245-46. Central to that conclusion, however, was that such a resolution was "judicial in nature" because "[i]t is typical for both parties to enter appearances and to submit briefs at appropriate times and for the court of appeals to enter a judgment and to issue a mandate at the end of the proceedings." *Id.* at 245. None of those features are present when a single circuit judge reviews a district judge's determination to grant CJA funding.

[10] This process—approval from the chief circuit judge—has been required for various administrative tasks performed by district judges. *See, e.g.*, Pub. L. No. 81-790, 64 Stat. 866, 866 (1950) (assigning temporary bankruptcy referees); Pub. L. No. 74-449, 49 Stat. 1140, 1140 (1936) (hiring law clerks). And like with these other tasks, Congress's provision of limited review was not an accident. Review was provided only for *grants* of funding over a certain amount because Congress was concerned with too *much* spending, not too little. *See* Robert J. Kutak, *The Criminal Justice Act of 1964*, 44 Neb. L. Rev. 703, 723 n.64 (1965) (examining legislative history).

the position that a payment, even one authorized by a chief circuit judge, was prohibited by the terms of the act." *United States v. Hunter*, 385 F. Supp. 358, 362 (D.D.C. 1974); *see also, e.g.*, 18 U.S.C. § 3006A(i) ("Payments . . . shall be made under the supervision of the Director of the Administrative Office of the United States Courts."); *United States v. Gast*, 297 F. Supp. 620, 621-22 (D. Del. 1969) (noting that a Comptroller General's Opinion prevented CJA funding that district judges had approved); *United States v. Naples*, 266 F. Supp. 608, 609 (D.D.C. 1967) (D.C. Circuit Chief Judge Bazelon noting that he "solicited the view of the Judicial Conference Committee to Implement the Criminal Justice Act" while considering whether to approve a request for excess compensation); Subcomm. on Constitutional Rights, S. Comm. on the Judiciary, *The Criminal Justice Act in the Federal District Courts* 213, 90th Cong. (Comm. Print 1968) (detailing Administrative Office rejections of judge-approved funding).

That a district judge's funding determination can be overruled without normal hierarchical review by superior courts indicates that it is an administrative act, not an exercise of judicial power. *See, e.g.*, *Miller v. French*, 530 U.S. 327, 342 (2000) (explaining that the exercise of judicial power is "subject to review *only* by superior *courts* in the Article III hierarchy") (quoting *Plaut*, 514 U.S. at 219) (emphases added); *Freytag*, 501 U.S. at 891 (concluding that the Tax Court's power was "judicial" in part because "decisions of the Tax Court are appealable *only* to the regional United States courts of appeals, with ultimate review in this Court") (emphasis added); *Postum Cereal Co.*, 272 U.S. at 698-99; *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442 (1923); *Ferreira*, 54 U.S. (13 How.) at 47; *Hayburn's Case*, 2 U.S. (2 Dall.) at 414. In fact, if a district judge's funding deter-

mination *were* judicial, then the system of administrative review provided for in the CJA would raise serious constitutional concerns. *See Hohn*, 524 U.S. at 245. The Court "should avoid any such implication." *Id.* at 246.

Additionally, because the CJA allows a chief circuit judge to revoke or revise a grant of funding, allowing an *appeal* of a district judge's determination would create an anomalous result. Petitioners whose funding requests are denied at the outset by a district judge would be able to attack that decision in the circuit court via an appeal under 28 U.S.C. § 1291. Yet those whose requests are granted at first by the district judge but rejected on review by the chief circuit judge have no such recourse, as § 1291 is limited to "decisions of the *district courts*." 28 U.S.C. § 1291 (emphasis added); *see also, e.g.*, *id.* § 1292(a)-(b) (providing for interlocutory review of district-court orders); *United States v. Johnson*, 391 F.3d 946, 949 (8th Cir. 2004) (dismissing appeal of chief judge's funding determination); *United States v. D'Andrea*, 612 F.2d 1386, 1387-88 (7th Cir. 1980) (same). The only way to avoid this anomaly is adherence to the review system provided for in the statute.[11]

3. Consequently, courts considering the question have unanimously held that funding determinations under the CJA—of which 18 U.S.C. § 3599 is a part, *Martel v. Clair*, 565 U.S. 648, 659-60 (2012)—are not judicial acts. Instead, they are exercises of one of the "increas-

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[11] Of course, defendants in federal criminal trials who are unable to obtain funding for services required by due process, *see, e.g.*, *Ake v. Oklahoma*, 470 U.S. 68 (1985), may appeal on that separate, constitutional basis. *See, e.g.*, *United States v. Bah*, 574 F.3d 106, 118-19 (2d Cir. 2009); *United States v. Roman*, 121 F.3d 136, 144 (3d Cir. 1997). No such claim is at issue here.

ing numbers of administrative responsibilities" that "district courts have been assigned," "leading to actions that are not subject to review by appeal." 15A Charles A. Wright et al., *Federal Practice and Procedure* § 3903, at 134 (2d. ed. 1992); *see, e.g.*, *Rojem v. Workman*, 655 F.3d 1199, 1200-02 (10th Cir. 2011) (dismissing an appeal of "the district court's denial of" petitioner's "Ex Parte Motion for Approval of Funding for Expert Assistance"); *United States v. French*, 556 F.3d 1091, 1093 (10th Cir. 2009) (collecting decisions dismissing appeals of other CJA-funding determinations); *cf. Brenner v. Manson*, 383 U.S. 519, 524 (1966) (explaining that while "Congress might confer such 'administrative' tasks upon the" judges of inferior courts, "it could not empower this Court to participate therein").[12]

CJA funding is a benefit "program . . . provid[ing] compensation and expense reimbursement for attorneys appointed to represent individuals with limited financial means in federal criminal [and habeas] proceedings"—a program that "Congress established within the judicial branch" to be "administered" by "the federal judiciary." United States Judicial Conference, *Report of the Committee to Review the Criminal Justice Act* 1 (Jan. 29, 1993), https://perma.cc/6JEB-JRAH. The distribution of public benefits is an administrative act, not a judicial function. In other words, although Congress assigned district judges the task of adjusting claims made under the CJA, administration of this public-benefit program is not consistent with the "common un-

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[12] Contrary to petitioner's contention, Cert. Reply Br. 12, the issue in *Rojem* was identical to this case—the district court denied that petitioner's request for expert funding in advance and in its entirety.

derstanding of what activities are appropriate ... to courts" in exercising the judicial power. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

In fact, ever since the CJA's enactment, judges have maintained that the task of resolving CJA-funding requests is better suited for other federal officers. *See, e.g.*, *Gonzales*, 150 F.3d at 1255 n.11 ("[T]here is much support for the replacement of judges with an independent administrative board, which would handle the judiciary's present functions in administering the CJA."); *Report of the Committee to Review the Criminal Justice Act*, *supra*, at 9-10, 44-49, 75-80; *see also id.* at 44 ("The need for independence is consistently stressed ... by many judges"); Tr. of Feb. 3, 2016 Mtg. of the Ad Hoc Comm. to Review the CJA at 3, 24 (remarks of Judge Rosemary Peterson) (calling for independent review of requests for non-counsel services), https://perma.cc/B5CJ-NXPY; Tr. of Mar. 2, 2016 Mtg. of the Ad Hoc Comm. to Review the CJA at 8-10 (remarks of Judge Richard Boulware) (similar), https://perma.cc/S2MA-A8AN. This widespread view would be inconceivable if that task were an exercise of the Article III judicial power.

C. Petitioner's arguments for jurisdiction are not persuasive.

In replying to respondent's certiorari-stage briefing raising this jurisdictional issue, Br. in Opp. 27-28, petitioner made three arguments for jurisdiction. None is persuasive.

First, petitioner argued that nothing in 18 U.S.C. § 3599 evinces Congress's intent to "oust[] superior courts of the more general jurisdiction they exercise by way of 28 U.S.C. §§ 1254 & 1291." Cert. Reply Br. 11. This misses the point. The question is whether § 3599

determinations are exercises of Article III judicial power. Appellate courts have never had Article III jurisdiction over non-judicial acts by district judges, and Congress cannot create jurisdiction in this Court over matters that are not judicial in nature. *See Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 723-24 (1929); *Ferreira*, 54 U.S. (13 How.) at 52; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

Second, petitioner points to this Court's exercise of jurisdiction in appeals concerning the CJA's *counsel-appointment* provisions, *see, e.g.*, *Christeson v. Roper*, 135 S. Ct. 891 (2015) (per curiam); *Martel*, 565 U.S. 648; *Harbison v. Bell*, 556 U.S. 180 (2009), as evidence that this Court has jurisdiction to review CJA *funding* determinations. Cert. Reply Br. 11.[13] But the appointment of counsel is inherently judicial and "has historically rested [with] the judiciary." *Report of the Committee to Review the Criminal Justice Act*, *supra*, at 4. Courts have long held it within their inherent judicial authority to appoint representation for the indigent. *See, e.g.*, *Powell v. State of Ala.*, 287 U.S. 45, 73 (1932) ("Attorneys are officers of the court, and are bound to render service when required by such an appointment."); *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965) ("Representation of indigents upon court order is an ancient tradition of the legal profession, going as far back as fifteenth-century England and pre-Revolutionary America."). Likewise, pre-CJA Federal

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[13] None of these decisions considered the jurisdictional question presented here, and "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).

Rule of Criminal Procedure 44 instructed a district court to assign counsel to a defendant who could not afford representation, but there was no "provision for his compensation or for defrayal of expenses incurred." Emanuel Celler, *Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 Minn. L. Rev. 697, 698 (1961).

Moreover, the first congressional foray into the provision of defense services as a government benefit—the District of Columbia Legal Aid Act, Pub. L. No. 86-531, 74 Stat. 229 (1960)—intentionally provided "administrative autonomy . . . free of direct judicial or other governmental supervision," with the goal "of creating an agency that both possesses and appears to possess independence of the judicial and prosecuting arms of [the] government." Francis A. Allen, *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* 25 (Feb. 25, 1963). In sum, the historical power to appoint counsel for an indigent defendant stands in stark contrast to the provision of government funds for defense and habeas services—particularly funds for investigations that can be carried out by non-lawyers (who are not "officers of the court," *Powell*, 287 U.S. at 73).

Third, petitioner points to § 3599(f)'s reference to "appellate review." Cert. Reply Br. 11. But this reference does not specify the object of appellate review, which is readily understood as the final judgment in the habeas case:

> No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed

> and *made a part of the record available for appellate review.*

18 U.S.C. § 3599(f) (emphasis added). These two sentences were inserted by AEDPA, Pub. L. No. 104-132, § 108, 110 Stat. 1214, 1226 (1996). They reflect Congress's concern that the ex parte nature of these funding requests to a district judge had "been greatly abused" as "just simply another way of dragging out the process and the proceeding, permitting the [habeas] counsel to argue his case outside the presence of the" government. 141 Cong. Rec. S7813, 7819 (daily ed. June 7, 1995) (statement of Sen. Hatch). Section 3599(f) mentions appellate review without defining its object, and that reference is naturally understood as merits review of the final judgment in the habeas action. After all, something said in the funding proceeding—such as a concession—could be relevant to the merits of the case. Regardless, such an oblique reference could not create Article III jurisdiction to review non-judicial actions taken by district judges. *See, e.g.*, *Lujan*, 504 U.S. at 576; *Old Colony Trust Co.*, 279 U.S. at 723-24; *Marbury*, 5 U.S. (1 Cranch) at 176.

II. For Defaulted Claims of Ineffective Assistance of Counsel, It Is Never "Reasonably Necessary" Under § 3599(f) to Pursue Evidence Regarding Trial Counsel's Performance that Is Outside the State-Court Record, Because AEDPA Bars Its Consideration.

Even if this Court had appellate jurisdiction, AEDPA precludes a federal-habeas court, in adjudicating a state prisoner's procedurally defaulted trial-IAC claim, from considering evidence regarding trial counsel's performance that is outside the state-court record. *See* 28 U.S.C. § 2254(e)(2) (statutory text in the appendix to this brief). It cannot be "reasonably necessary for the representation of the defendant," under 18 U.S.C. § 3599(f), to pursue evidence that cannot be considered by the federal court and thus cannot change the outcome. *See* Br. in Opp. 28-30.

What is "reasonably necessary for the representation" depends on the nature of the proceeding. Although petitioner seeks funding for a federal-habeas challenge, he fails entirely to account for the effect of AEDPA's limitations. Here, 28 U.S.C. § 2254(e)(2) limits the evidence on petitioner's procedurally defaulted trial-IAC claim to only the evidence admitted in state-court proceedings (both trial and habeas). A federal court deciding petitioner's defaulted trial-IAC claim cannot consider any evidence uncovered by the investigation that petitioner seeks to undertake. So it is not "reasonably necessary" under § 3599(f) to fund that investigation.

A. If evidence regarding trial counsel's performance is not in the state-court record, 28 U.S.C. § 2254(e)(2) bars its consideration in deciding a procedurally defaulted ineffective-assistance-of-counsel claim.

1. In AEDPA, Congress chose to limit not only the claims that can be brought in federal habeas, 28 U.S.C. § 2254(a), (b), but also the evidence that can be used to support those claims, *id.* § 2254(d), (e); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Whether investigative funding is "reasonably necessary" under 18 U.S.C. § 3599(f) in a federal-habeas case cannot be judged without accounting for AEDPA's limits.

Petitioner's brief does not address 28 U.S.C. § 2254(e)(2), which "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186 (citing *Williams*, 529 U.S. at 427-29); *accord Schriro v. Landrigan*, 550 U.S. 465, 473 n.1 (2007).[14] This restriction applies whether a petitioner seeks to introduce new evidence through a live evidentiary hearing or written submission. *Holland*, 542 U.S. at 653.

AEDPA's bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual ba-

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[14] Section 2254(e)(2)'s bar on new evidence applies equally to exhausted and unexhausted claims. *See, e.g., Landrigan*, 550 U.S. at 478-79 ("Landrigan failed to develop this claim properly before the Arizona courts, and § 2254(e)(2) therefore barred the District Court from granting an evidentiary hearing on that basis"); *Williams*, 529 U.S. at 437-40 (applying § 2254(e)(2) to prohibit the introduction of evidence that would support an unexhausted *Brady* claim).

sis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). That opening clause is met if the prisoner "was at fault for failing to develop the factual bases for his claims in state court," *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam), meaning a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. Under accepted agency principles, this Court has held that state-habeas counsel's lack of diligence is attributed to the prisoner for § 2254(e)(2) purposes. *See infra* pp. 35-36 (quoting *Holland*, 542 U.S. at 652-53; *Williams*, 529 U.S. at 437, 439-40).

This opening clause thus creates an exclusion from § 2254(e)(2)'s general bar: new evidence can be received where "the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams*, 529 U.S. at 435. Two more exclusions exist to AEDPA's statutory bar on receiving new evidence: where a claim relies on (1) a new, retroactive, previously unavailable "rule of constitutional law" or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(i), (ii). For either of those two exclusions to apply, the facts must also show that, but for the alleged error, no reasonable factfinder would have found the prisoner "guilty of the underlying offense." *Id.* § 2254(e)(2)(B).

2. Section 2254(e)(2)'s bar on new evidence regarding trial counsel's performance always applies when a state prisoner presents a procedurally defaulted trial-IAC claim. None of § 2254(e)(2)'s three exclusions can be satisfied in this scenario.

a. The first exclusion cannot apply to procedurally defaulted trial-IAC claims. When a trial-IAC claim is procedurally defaulted because it was not raised by

state-habeas counsel, then there was not a "diligent" attempt, *Williams*, 529 U.S. at 432, "to develop the factual basis of [that trial-IAC] claim in State court proceedings." 28 U.S.C. § 2254(e)(2).[15]

For instance, petitioner asserts that his state-habeas counsel was ineffective in failing to develop evidence of trial counsel's purportedly unreasonable failure to investigate petitioner's substance abuse and mental illness. Pet. Br. 44. That position, if accepted, necessarily means that state-habeas counsel was not diligent in developing the factual basis for this *Wiggins* trial-IAC claim. And this Court has held multiple times, when addressing 28 U.S.C. § 2254(e)(2)'s bar on new evidence, that the "fault" of a "lack of diligence" by state-habeas counsel is attributed to the prisoner, *Williams*, 529 U.S. at 434:

- "Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied." *Holland*, 542 U.S. at 652-53 (citing *Williams*, 529 U.S. at 439-40).

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[15] If the trial-IAC claim relies on evidence that could not have been discovered during the prior state-habeas proceedings, the claim is unexhausted but *not* defaulted. *See* Tex. Code Crim. Proc. art. 11.071 § 5(a)(1), (e) (allowing a successive petition if the "the factual . . . basis for the claim was unavailable"—that is, "not ascertainable through the exercise of reasonable diligence"—"on the date the applicant filed the previous" petition); *see also Davila v. Davis*, 137 S. Ct. 2058, 2064 & n.1 (2017) (a claim is "procedurally defaulted" when the state court would deny the claim in a successive state-habeas petition "based on an adequate and independent state procedural rule").

- "[State postconviction] [c]ounsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2)." *Williams*, 529 U.S. at 439-40.
- "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.*

b. The second exclusion from the § 2254(e)(2) bar also does not apply in this context. Petitioner has not asserted—and cannot assert—that his *Wiggins* trial-IAC claim relies on a new, retroactive, previously unavilable "rule of constitutional law." 28 U.S.C. § 2254(e)(2)(A)(i). *Wiggins* was decided 14 years ago, and *Washington v. Strickland* recognized trial-IAC claims over 30 years ago, 466 U.S. 668, 687 (1984). Nor can petitoner rely on *Martinez* or *Trevino* to satisfy this exception. Neither establishes a "claim"; rather, they establish a cause to excuse procedural default. *Trevino*, 133 S. Ct. at 1921; *Martinez*, 566 U.S. at 9. Additionally, neither is a new "constitutional" rule of law; those decisions create a mere equitable exception. *Martinez*, 566 U.S. at 13, 16; *see Trevino*, 133 S. Ct. at 1921.

c. Finally, the third exclusion is not met because a procedurally defaulted trial-IAC claim never involves a situation where the claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). For trial counsel to have been ineffective by failing to present certain evidence or object to a jury instruction or by some other lapse, the facts that should have prompted trial counsel to act must have been discoverable with due diligence by trial

counsel—and, *a fortiori*, by state-habeas counsel. *See, e.g.*, *Sellers v. Ward*, 135 F.3d 1333, 1343 (10th Cir. 1998).

Petitioner here asserts that his state-habeas counsel procedurally defaulted the *Wiggins* trial-IAC claim, Pet. Br. 52, and that the new evidence he seeks to obtain is "what a proper pre-trial investigation would have unearthed, based on the very red flags that trial counsel ignored," Pet. Br. 45. But that position means that due diligence during state habeas *would* have unearthed this claim's factual predicate, foreclosing resort to the third exception under § 2254(e)(2).[16]

3. Disregarding the § 2254(e)(2) bar would violate not only AEDPA's text but its purpose. Holding that bar inapplicable to defaulted trial-IAC claims would encourage habeas petitioners to sandbag and decline to raise trial-IAC claims in state court so that they get more favorable treatment in federal court. *Cf. Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015) ("Ward may have strategically conceded his IAC claim was unexhausted [and defaulted] to obtain de novo review and funding to investigate").

For example, if petitioner had brought his substance-abuse and mental-illness *Wiggins* trial-IAC claims in state-habeas proceedings, AEDPA would re-

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[16] Section 2254(e)(2)'s second and third exclusions also do not apply to trial-IAC claims regarding sentencing, such as *Wiggins* claims, because they cannot show that no reasonable factfinder "would have found the applicant guilty of the underlying *offense*." 28 U.S.C. § 2254(e)(2)(B) (emphasis added); *see In re Webster*, 605 F.3d 256, 258 (5th Cir. 2010) (identical language in 28 U.S.C. § 2255(h)(1) refers to "guilty of the offense," not "'eligible for a death sentence'"); *id.* at 258 n.4 (collecting cases in accord under identical language of 28 U.S.C. § 2244(b)(2)(B)(ii)).

quire deference on federal review to the state court's fact-findings. 28 U.S.C. § 2254(d)(2), (e)(1). And, if petitioner had raised these claims in state court, it would be crystal clear that federal-habeas review would be limited to only the evidence presented in state court. *Pinholster*, 563 U.S. at 181 (citing 28 U.S.C. § 2254(d)(1)). In fact, petitioner *did* raise a *Wiggins* trial-IAC claim on state habeas, arguing a failure to investigate possible mitigation evidence from his Honduran family. R.5294-5301, 5561, 5719-23, 5767-69. If the relevant inquiry is whether the state-habeas court adjudicated any type of *Wiggins* trial-IAC claim—treating a "claim" at a higher level of generality than respondent has to date—then federal-habeas evidence regarding trial counsel's performance would be limited to the state-court record not only under 28 U.S.C. § 2254(e)(2) but also under *Pinholster*'s explication of 28 U.S.C. § 2254(d)(1).

In any event, through AEDPA, Congress intended to channel prisoners' claims first to state courts. "Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Pinholster*, 563 U.S. at 186. And even before Congress enacted AEDPA, this Court held that habeas rules should discourage petitioners from presenting new evidence in federal court: "ensuring that full factual development of a claim takes place in state court channels the resolution of the claim to the most appropriate forum." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-10 (1992).

A petitioner who failed to show diligence in state court should not be rewarded with a full evidentiary hearing and de novo review of his defaulted claims in federal court. That is precisely why multiple circuit courts have ruled that § 2254(e)(2) bars the introduction

of new evidence regarding trial-IAC claims that could have, or should have, been pursued earlier. *See, e.g.*, *King v. Westbrooks*, 847 F.3d 788, 799 (6th Cir. 2017); *Williams v. Trammell*, 782 F.3d 1184, 1211 (10th Cir. 2015), *cert. denied sub nom. Williams v. Warrior*, 136 S. Ct. 806 (2016); *Miles v. Ryan*, 713 F.3d 477, 492 (9th Cir. 2013); *Ward v. Hall*, 592 F.3d 1144, 1158-61 (11th Cir. 2010); *Williams v. Norris*, 576 F.3d 850, 862-63 (8th Cir. 2009).

B. *Martinez v. Ryan*'s equitable exception to the procedural-default rule has no bearing on AEDPA's independent bar on consideration of new evidence.

Petitioner has argued that § 2254(e)(2)'s bar on new evidence should be ignored if he shows ineffectiveness of his state-habeas counsel. Cert. Reply Br. 14. But this Court has already held multiple times that state-habeas counsel's lack of diligence is attributed to a prisoner for purposes of § 2254(e)(2). *See supra* pp. 35-36 (quoting *Holland*, 542 U.S. at 652-53; *Williams*, 529 U.S. at 437, 439-40).

To be sure, *Martinez* created a "narrow exception" to the *court-created* rules regarding procedural default; that exception excuses the bar on *considering* defaulted claims if state-habeas counsel was ineffective in pursuing a substantial trial-IAC claim. 566 U.S. at 8. But *Martinez*'s holding necessarily has no bearing on AEDPA's independent bar on what *evidence* federal-habeas courts may consider, for multiple reasons.[17]

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[17] *Martinez* did not create a constitutional right to effective counsel in state-habeas proceedings. 566 U.S. at 13, 16. Petitioner has not asked this Court to overrule precedent and recognize a constitutional right to either effective state-habeas counsel or

First, exempting a prisoner from § 2254(e)(2) based on his state-habeas counsel's ineffectiveness (as *Martinez* did for procedural default of certain claims) would negate the statute. State-habeas counsel's lack of diligence in developing facts is precisely what *triggers* § 2254(e)(2)'s bar. *Williams*, 529 U.S. at 435. Allowing that same lack of diligence to *excuse* the bar would essentially nullify the statutory trigger.[18]

Second, *Martinez*'s "narrow" exception applied only to the rules regarding "procedural default." *Martinez*, 566 U.S. at 8, 17. *Martinez* carefully circumscribed its holding: "The rule of *Coleman*[*v. Thompson*, 501 U.S. 722 (1991),] governs in all but the limited circumstances recognized here." *Id.* at 16. *Martinez* said nothing about the types of evidence that a federal-habeas court could consider and never even cited § 2254(e)(2).

Third, *Martinez* created an "equitable" exception to a judicially developed rule, 566 U.S. at 8, 14, but Congress's directives in federal statutes like AEDPA supersede any judicially developed rules. The rules barring federal consideration of claims defaulted in state court "are elaborated in the exercise of the Court's discretion." *Id.* at 13. In contrast, AEDPA contains

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an evidentiary hearing. Any such request at this stage has been waived and cannot be considered by the Court.

[18] Section 2254(e)(2) would not bar a habeas petitioner invoking *Martinez* from presenting evidence outside the state-court record if that evidence does not concern trial counsel's performance and concerns solely state-habeas counsel's performance (for example, evidence that state-habeas counsel was under the influence of drugs throughout the state-habeas proceedings). Such evidence would not implicate the underlying trial-IAC claim—that is, "the factual basis of [the] claim" that had to be diligently pursued in state court under § 2254(e)(2).

Congress's directives about what evidence a federal-habeas court may consider. When Congress has directly addressed a situation through legislation, those statutes control and supersede any potentially applicable judicially created rules. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-16 (1981). Indeed, Congress can remove a court's equitable discretion altogether. *See, e.g.*, *Miller*, 530 U.S. at 341.

Before AEDPA, this Court had developed rules outlining what evidence a federal-habeas court could consider in resolving claims undeveloped in state court; this Court chose the cause-and-prejudice standard from the procedural-default context. *Keeney*, 504 U.S. at 6. But Congress, through AEDPA, pointedly eliminated that judicially developed cause-and-prejudice standard for receiving new evidence and replaced it with § 2254(e)(2), which "raised the bar" for federal-habeas petitioners. *Williams*, 529 U.S. at 433.

In interpreting § 2254(e)(2), *Williams* gave effect to what "Congress intended." *Id.* And when AEDPA was enacted in 1996, Congress would have understood—in reliance on this Court's 1991 and 1992 decisions in *Coleman* and *Keeney*, respectively—that any lack of diligence by state-habeas counsel would be attributed to the prisoner under "well-settled principles of agency law." *Coleman*, 501 U.S. at 754; *see Davila*, 137 S. Ct. at 2065. The Court applied *Coleman*'s rule to this very context in *Keeney*, when it refused to allow new evidence based on postconviction "counsel's negligent failure to develop the facts." 504 U.S. at 4; *see id.* at 7-11. When Congress "raised the bar" in AEDPA, *Williams*, 529 U.S. at 433, it could not have intended a weaker rule than the one adopted in *Keeney*. That reality further supports the Court's holding in *Williams* that state-habeas counsel's lack of diligence is attributed to the

prisoner for purposes of § 2254(e)(2). 529 U.S. at 437, 439-40.

Fourth, and relatedly, statutory *stare decisis* applies here: This Court has already held multiple times that state-habeas counsel's lack of diligence is attributed to the prisoner for purposes of § 2254(e)(2). *See supra* pp. 35-36 (quoting *Holland*, 542 U.S. at 652-53; *Williams*, 529 U.S. at 437, 439-40). So this is not a context like *Martinez*, where the Court concluded that its precedent had left open the question whether state-habeas counsel's error could be attributed to the prisoner for purposes of the procedural-default bar at issue there. *See Martinez*, 566 U.S. at 10; *id.* at 15 ("in the 20 years since *Coleman* was decided, we have not held *Coleman* applies in circumstances like this one"). As the Court recently explained, "*stare decisis* carries enhanced force when a decision ... interprets a statute." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Interpreting a statute is precisely what *Holland* and *Williams* did in holding that state-habeas counsel's lack of diligence in pursuing a claim means that the prisoner "failed to develop" that claim's basis in state court, triggering § 2254(e)(2).

Finally, the Court in *Martinez* believed that its holding "ought not to put a significant strain on state resources," 566 U.S. at 15, but that is exactly what will happen if federal-habeas petitioners asserting defaulted trial-IAC claims can begin relying on evidence outside the state-court record regarding trial counsel's performance. Even before Congress enacted AEDPA, this Court explained that "requiring a federal evidentiary hearing solely on the basis of a habeas petitioner's negligent failure to develop facts in state-court proceedings dramatically increases the opportunities to relitigate a conviction." *Keeney*, 504 U.S. at 8-9. And

"[i]t is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings." *Id.* at 9.

The request here is case in point. Years after state-habeas proceedings concluded, petitioner has asked for funding to perform a comprehensive social-history investigation that includes interviewing "'virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors,' and so forth." J.A. 277.

If federal-habeas petitioners are now allowed to contravene AEDPA and raise evidence about trial counsel's performance that is outside the state-court record, this will "impose significant systemic costs" on both the Judiciary and the States defending against these claims. *Davila*, 137 S. Ct. at 2068. As the Court recently concluded, "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." *Id.* at 2070 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).[19]

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[19] Petitioner's certiorari-stage briefing cited two post-*Martinez* circuit cases to argue that § 2254(e)(2) does not limit the evidence that federal courts can consider, if *Martinez* is invoked. Cert. Reply Br. 13-15. But *Canales v. Stephens*, 765 F.3d 551, 571 n.2 (5th Cir. 2014), expressly declined to reach the issue. And *Dickens v. Ryan*, 740 F.3d 1302, 1321-22 (9th Cir. 2014) (en banc), failed to give effect to this Court's prior holdings in *Holland* and *Williams* recognizing that state-habeas counsel's lack of diligence is attributed to a prisoner for purposes of § 2254(e)(2). The Court should also reject the Ninth Circuit's holding in *Dickens* for the reasons expressed in dissent there by Judges Callahan, Kozinski, and Bybee. *See id.* at 1328.

III. The Fifth Circuit Uses a Proper Standard for Assessing § 3599(f) Funding Requests in Habeas Cases, and Petitioner's Funding Request Was Properly Denied.

Federal courts lack appellate jurisdiction to review a district judge's denial of § 3599(f) investigative-funding requests. *See supra* Part I. But even assuming such jurisdiction exists, the Fifth Circuit's "substantial need" formulation is a proper description of what satisfies § 3599(f)'s "reasonably necessary" standard *in the context of federal-habeas proceedings*.

A. "Substantial need" is a permissible formulation of § 3599(f)'s standard in habeas cases.

Courts cannot determine what is "reasonably necessary for the representation of the defendant," 18 U.S.C. § 3599(f), apart from considering the context in which the representation is conducted. Here, AEDPA significantly limits federal-habeas proceedings with respect to the claims that prisoners can bring and the evidence that they can use. In light of AEDPA's standards, the Fifth Circuit has correctly described the standard for granting investigative funding on federal habeas as requiring a "substantial need."

1. AEDPA and the Court's precedents impose many limits on federal-habeas review of state convictions, such as:

- A petitioner may raise only constitutional claims. 28 U.S.C. § 2254(a).
- A petitioner cannot obtain relief on a claim adjudicated in state court unless the adjudication was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of

the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d).

- Courts must presume that all state-court fact-findings are correct, and this presumption can be overcome only by "clear and convincing evidence." *Id.* § 2254(e)(1).
- New evidence is prohibited in many circumstances. *Id.* § 2254(d)(1), (e)(2); *Pinholster*, 563 U.S. at 181.
- An appeal of the denial of habeas relief requires a certificate of appealability, which may only be issued upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).
- Under *Martinez*, a petitioner seeking to excuse procedural default by showing state-habeas IAC must show that his underlying trial-IAC claim is "a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 566 U.S. at 14.

When Congress enacted AEDPA in 1996, it included an amendment to § 3599(f)'s predecessor: instead of stating that the judge "shall authorize" a petitioner's attorneys to obtain the reasonably necessary services, subsection (f) now states that the court "may authorize" those services. Pub. L. No. 104-132, 110 Stat. 1214, 1226. Moving from "shall" to "may" indicates a congressional intent to give more discretion to district judges. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *United States v. Olano*, 507 U.S. 725, 736-37 (1993) (holding that "may" confers discretion to deny relief even when enumerated requisites are met, "for otherwise the discretion afforded . . . would be illusory," and that this discretion is properly used only in

"serious[]" instances);[20] *see also* 7 *Guide to Judiciary Policy*, *supra*, §§ 660.10.10-.20, https://perma.cc/37L7-USYZ (distinguishing between pre-AEDPA and post-AEDPA requests for investigative services).

2. In light of the standards set by AEDPA and the discretion given to judges in determining when to authorize investigative funding, the Fifth Circuit properly described § 3599(f) as requiring a "substantial need" in the context of federal-habeas proceedings.

In the federal-habeas context, only a "*substantial*" defaulted trial-IAC claim may possibly be considered by federal courts. *Martinez*, 566 U.S. at 17 (emphasis added). And in a federal-habeas case, obtaining a certificate of appealability requires a "*substantial* showing of the denial of a constitutional right," such that "the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added; internal quotation marks omitted).

Likewise, the Fifth Circuit's "substantial need" standard for § 3599(f)-funding requests in the federal-habeas context ensures that the investigation "deserve[s] encouragement to proceed further." *Id.* The Seventh Circuit also requires a similar "preliminary showing" before funding may be authorized. *Burris v. Parke*, 130 F.3d 782, 784 (7th Cir. 1997). This does not require petitioner to fully prove success on the merits. *Cf.* Pet. Br. 23.

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[20] Accordingly, the most relief that petitioner could achieve in this appeal, assuming jurisdiction, is a remand for the district judge to exercise his discretion whether to grant even "reasonably necessary" funding.

As petitioner concedes, the Fifth Circuit developed the substantial-need formulation in federal-habeas cases, which are subject to the limits noted above. Pet. Br. 36 (citing *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir. 2000); *Fuller*, 114 F.3d at 495-96). And the Fifth Circuit has applied this formulation multiple times in situations—like this case—where federal-habeas courts would be barred from considering evidence outside the state-court record. *See Riley v. Dretke*, 362 F.3d 302, 307-08 (5th Cir. 2004); *Fuller*, 114 F.3d at 502.

The Fifth Circuit has also limited the use of the substantial-need formulation to federal-habeas cases. *Brown v. Stephens*, 762 F.3d 454, 459-60 (5th Cir. 2014) (recognizing that federal-habeas cases require substantial need but stating that the court had not yet determined what was necessary in clemency cases). Petitioner has not cited any instance in which the Fifth Circuit used the substantial-need language outside the habeas context.

When the Sixth Circuit rejected the Fifth Circuit's "substantial need" formulation, even the Sixth Circuit expressly recognized that the Fifth Circuit had treated clemency proceedings differently for purposes of § 3599(f). *Matthews v. White*, 807 F.3d 756, 760 (6th Cir. 2015). This Sixth Circuit case itself involved a clemency proceeding—not a habeas proceeding. *Id.* Even then, the Sixth Circuit still required proof of a "substantial question" before granting funds under § 3599(f). *Id.*; *see also Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998) (same). And the Sixth Circuit recognized that the nature of "the context of federal habeas proceedings" will affect what questions are "substantial" and what testimony might be useful. *Matthews*, 807 F.3d at 760.

The Fifth Circuit did not rewrite the applicable test, *cf.* Pet. Br. 28, but merely applied it in the federal-habeas context presented.

3. Petitioner argues that essentially no analysis of the underlying claim's merits can be conducted in deciding § 3599(f) funding requests. Pet. Br. 28-30. But this ignores that courts routinely, and justifiably, deny § 3599 funding for claims that will not succeed.

The Fifth Circuit has correctly explained that a district judge can deny funding when the petitioner has "(a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought-after assistance would only supplement prior evidence." *Brown*, 762 F.3d at 459; *see* J.A. 385 ("There must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented.").

There is nothing new or unique about recognizing that pursuing meritless claims is not reasonably necessary under § 3599. This Court has ruled that a "court was not required to appoint a new lawyer [under § 3599] just so [habeas petitioner] could file a futile motion." *Martel*, 565 U.S. at 666. In *Landrigan*, this Court held that "the District Court was well within its discretion to determine that, even with the benefit of an evidentiary hearing, Landrigan could not develop a factual record that would entitle him to habeas relief." 550 U.S. at 475; *see id.* at 474 ("[I]f the record... precludes habeas relief, a district court is not required to hold an evidentiary hearing."). Relatedly, in *Rhines v. Weber*, this Court recognized that it would be an abuse of discretion to grant a stay and abeyance (so that petitioner could exhaust his unexhausted claims)

when those claims are "plainly meritless." 544 U.S. 269, 277 (2005).

Multiple circuit courts have similarly affirmed the denial of funding by analyzing the merits of the underlying claims. *See, e.g.*, *Foley v. White*, 835 F.3d 561, 564 (6th Cir. 2016); *Muhammad v. Kelly*, 575 F.3d 359, 375 (4th Cir. 2009) (also citing § 2254(e)(2)); *Riley v. Taylor*, 277 F.3d 261, 314-15 (3d Cir. 2001) (en banc); *Burris*, 130 F.3d at 784-85.

Petitioner argues that the courts below here considered the merits of his claims too early—without allowing him to supplement his arguments with additional investigation and evidence. But § 3599(f) does not guarantee petitioner an evidentiary hearing, and the Court in *Martinez* anticipated that States could end habeas cases by arguing that defaulted trial-IAC claims were "insubstantial." 566 U.S. at 16. It is thus permissible for courts to conduct a preliminary analysis of the merits when reviewing funding determinations.

4. Petitioner's proposed standard for § 3599(f) investigative funding provides effectively no limit. Petitioner argues that funding must be granted whenever a reasonable attorney working with "finite means" would "devote resources" to the services. Pet. Br. 3. The mere existence of "finite" but otherwise unspecified means leaves open whether a reasonable attorney would "devote resources" to (1) investigation of every non-frivolous potential claim or (2) only investigations of claims judged, ex ante, to have substantial merit.

In large part, petitioner argues against the second view, contending that essentially no merits analysis should occur at the funding stage and faulting the Fifth Circuit for assessing the merits too early. Pet. Br. 28-30. But that narrows petitioner's "finite means" test to asking only whether the funding motion would be

"baseless" or "frivolous." Pet. Br. 3, 25. And limiting funding to only those habeas petitions that pass the "frivolous" threshold is no limit at all: The rules of civil procedure *already* prohibit frivolous filings. Fed. R. Civ. P. 11. So § 3599(f)'s standard does no work if it is limited only to frivolous motions.

Nonetheless, petitioner seems to argue that federal-habeas counsel should be allowed to start an entirely new investigation into any potential habeas claim—even if such claims or evidence would be barred by AEDPA. Pet. Br. 24 ("A test that short-circuits the development of claims is at odds with Congress's intent because reasonable attorneys begin client representations by investigating issues, not 'claims' of known merit and viability."). But habeas petitioners are not entitled to funding to undertake fishing expeditions to discover claims that may or may not exist. *See, e.g.*, *Calderon v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 98 F.3d 1102, 1107 (9th Cir. 1996) (denying pre-petition discovery).

At other times, however, petitioner appears to concede that § 3599(f)'s "reasonably necessary" standard requires a habeas petitioner to do *more* than identify a non-frivolous claim. *E.g.*, Pet. Br. 43 (stating that a petitioner must show a "plausible" claim before obtaining funding). But that proves respondent's basic point: the resulting analysis will necessarily require some inquiry into the merits of the underlying claim.

Petitioner also asserts that the phrase "reasonably necessary" had a preexisting meaning that was codified when Congress adopted 21 U.S.C. § 848(q), which later became § 3599. Pet. Br. 31-32. In short, the prior statute referred to "necessary" services, which the circuit courts judged under a standard of reasonableness. Pet. Br. 31-32. This standard, petitioner asserts, requires granting funds whenever the "'underlying facts reason-

ably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge.'" Pet. Br. 37-38. But petitioner not only ignores that AEDPA changed this law, *see supra* pp. 45-46, he relies solely on *non-habeas* cases. Each of the cases he cites refers to funding for criminal trials, which present different needs, policies, and constitutional requirements—all of which affect whether funding is reasonably necessary. *See, e.g.*, *United States v. Patterson*, 724 F.2d 1128, 1131 (5th Cir. 1984) (per curiam); *United States v. Durant*, 545 F.2d 823, 827-28 (2d Cir. 1976); *United States v. Schultz*, 431 F.2d 907, 911 (8th Cir. 1970). Petitioner's reference to the "private attorney" standard also is supported solely by criminal cases, not habeas cases. Pet. Br. 32.

B. Petitioner's request for investigative funding was properly denied.

There was no error in denying petitioner's request for investigative funding to obtain evidence outside the state-court record in support of his *Wiggins* trial-IAC claims about mental-health and substance-abuse issues.[21] Even if this Court goes beyond the state-court record and considers all of the evidence that petitioner seeks to investigate and introduce in federal habeas, *but see supra* Part II, petitioner has not raised a substantial claim that trial counsel's investigation was constitutionally deficient. As such, state-habeas counsel was not ineffective in failing to raise petitioner's new *Wiggins* claims. Those claims therefore remain barred as procedurally

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[21] Petitioner has not sought § 3599(f) funding to investigate his new claims regarding the Capital Murder Summary Memorandum. J.A. 37-40.

defaulted. As a result, petitioner's funding request—which was made available only in part to respondent and just for the first time after certiorari was granted—does not demonstrate a reasonable need to fund further investigation into a claim that is both meritless and procedurally barred.

1. Petitioner has not raised a substantial claim that trial counsel's mitigation investigation fell below constitutional standards. Petitioner must establish that trial counsel's decision not to further investigate substance-abuse and mental-health issues was unreasonable under prevailing professional norms. *Wiggins*, 539 U.S. at 523. In assessing reasonableness, a court must consider "the quantum of evidence already known to counsel," and "whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527. And the Court accords a "'heavy measure of deference'" to counsel's decisions. *Rompilla v. Beard*, 545 U.S. 374, 381 (2005).

If the Court looks solely at the state-court record, as required by 28 U.S.C. § 2254(e)(2), the "quantum of evidence" known to trial counsel regarding petitioner's substance abuse and mental illness is almost nonexistent and would not have triggered further inquiry. Trial counsel was aware merely that petitioner was intoxicated when he confessed to Nuila and may have driven while drunk in 1991. J.A. 122; R.1599. Petitioner himself in 1995 denied having drug, alcohol, or health problems. R.4597, 5137. And the state-court record does not reveal any reason for trial counsel to believe that petitioner had a mental illness.

Even if the Court were to consider new evidence submitted by petitioner on federal habeas, it could not demonstrate that reasonable trial counsel would have been "on notice of the need for [further] investigation."

2 Brian R. Means, *Postconviction Remedies* § 35:6 at 520-21 (2d ed. 2016). As recognized by the courts below, the evidence of petitioner's mental illness post-dates his trial. J.A. 360-61, 388-89 (referring to petitioner's TDCJ medical records from 2000 and later); *see* J.A. 141-46; R.770-71. Petitioner's subsequent diagnosis of schizophrenia does not demonstrate that trial counsel—at the time of trial—should have known that they needed to investigate further.

Petitioner asserts that trial counsel was aware that petitioner had headaches at the time of trial, abused alcohol and cocaine at the time of the murder, and had head injuries in the past. R.687-88. As explained above, *see supra* p. 11, petitioner did not put this evidence into any court record—including the record in this case—so it cannot be considered now by this Court. *See, e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."). Regardless, it does not prove that a reasonable attorney would have committed significant resources to discovering if petitioner's head injuries caused a mental illness.

Furthermore, presenting evidence of substance abuse and mental illness at trial could have harmed petitioner's case. The prosecutors put on evidence that petitioner in 1995 denied having drug, alcohol, or health problems. R.4597, 5137. Claiming that petitioner had substance-abuse problems would have suggested a propensity to lie, a fact that would not have helped in mitigation. Similarly, including petitioner's jail infractions for "possession of home-made intoxicants" would not have assisted his mitigation defense either. R.874.

The federal-habeas record also includes several affidavits from petitioner's family, R.845-72, some of which were attached to his § 3599(f) motion for funding. J.A.

316-40. But those affidavits do not identify any facts that were proven to be known to trial counsel and, therefore, cannot be used as a basis to judge whether trial counsel's investigation was reasonable.

Petitioner's separate *Wiggins* claim regarding trial counsel's failure to obtain additional evidence from his Honduran family was raised by state-habeas counsel and resolved against petitioner; petitioner has not sought review of that claim in this Court. J.A. 245-52.[22] It would be improper, therefore, to consider any evidence from petitioner's Honduran family members beyond evidence in the state-court record. In fact, *Pinholster*, 563 U.S. at 181, and 28 U.S.C. § 2254(d)(1) separately bar federal courts from considering this new evidence, as this *Wiggins* claim—regarding investigation into evidence from petitioner's Honduran family members—was adjudicated in state court.

But even if this evidence were considered, these affidavits reveal very little. One of petitioner's sisters stated that petitioner had been held for ransom in Mexico. R.862. Another sister stated that, after a trip to the United States, petitioner was "very sensitive," "not the same person as a result of what he suffered on the trip," and "very thin." J.A. 331. And petitioner's uncle noted that petitioner had "changed a bit" and "looked worried and stressed out," which the uncle attributed to homesickness. J.A. 322. Even if trial counsel were aware of

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[22] Regardless, that claim is meritless for the reasons given by the courts below: trial counsel abided by petitioner's instruction not to contact his Honduran family members. *See Landrigan*, 550 U.S. at 475 ("If Landrigan issued such an instruction, counsel's failure to investigate further could not have been prejudicial under *Strickland*.").

this testimony (and there is no evidence they were), it falls far short of establishing a constitutional obligation for counsel to conduct a mitigation investigation into substance abuse or mental health.

The remaining investigation proposed by petitioner, covering witnesses in California and Mexico, does not seek to uncover any additional evidence of what trial counsel knew and whether that knowledge should have caused them to investigate further. J.A. 307-13. Thus, the reasonableness of trial counsel's investigation can be judged on the evidence already in the record, without needing further investigation or § 3599(f) funding. That evidence shows that trial counsel acted reasonably; nothing petitioner sought in his proposed investigation was going to change that.

2. Because trial counsel's investigation did not violate constitutional standards, it was not deficient for state-habeas counsel to decline to raise petitioner's substance abuse and mental illness as support for a *Wiggins* trial-IAC claim. Because state-habeas counsel was not ineffective, this *Wiggins* claim remains barred as procedurally defaulted. The information uncovered by state-habeas counsel, and included in the state-habeas record, actually supports trial counsel's judgment not to investigate further about substance-abuse or mental-health issues. State-habeas counsel learned that petitioner had (1) an above-average IQ, R.5582; (2) no major health injuries or illnesses as a child, J.A. 91, 101, 111; and (3) a stable background and good performance at school, J.A. 90-91, 100-01, 110-11.

Moreover, by the time that state-habeas counsel learned of petitioner's mental illness, that counsel had already argued to the court that trial counsel was ineffective for failing to put petitioner on the stand during the guilt phase. R.5558. Evidence of a developing men-

tal illness would have undercut that argument, so habeas counsel made a reasonable strategic decision.

3. Finally, even assuming deficient performance of trial counsel, petitioner still has not raised a substantial claim of prejudice. This requires a "substantial" likelihood that the jury would have given him a life sentence rather than the death penalty. *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Under Texas's system, then, petitioner must show a substantial likelihood that a juror would have found sufficient mitigating circumstances to warrant a sentence of only life imprisonment. Tex. Code Crim. Proc. art. 37.071, § 2.

The murder of Santiaga Paneque was brutal; her neck was deliberately squeezed for three to six minutes in order to cause her death. J.A. 354. Three days later, petitioner robbed two individuals at gunpoint, threatened to kill them both, and then threatened to kill one victim's family if he went to the police. J.A. 127. Shortly after that, petitioner threatened to kill Nuila if he did not help petitioner kill his accomplices. J.A. 121-22. And petitioner already had convictions for burglary and drug-dealing offenses, which resulted in jail time after he violated probation. R.4608-10.

Against the backdrop of these multiple crimes and significant threats of violence, petitioner posits his substance abuse and the early stages of schizophrenia as mitigation evidence. But courts recognize that such evidence can be aggravating just as often as it can be mitigating. *See, e.g.*, *Cannon v. Gibson*, 259 F.3d 1253, 1277-78 (10th Cir. 2001) (concluding that failure to present evidence of psychiatric disorders as mitigation was not prejudicial and could have strengthened the argument that the defendant was a threat to society); *Waldrop v. Jones*, 77 F.3d 1308, 1313 (11th Cir. 1996) (stating that evidence of excessive drug and alcohol use might have

harmed the mitigation argument). And this is particularly true here, where introducing substance-abuse evidence would have shown that petitioner had lied. *See supra* p. 53.

Given this context, there is not a "substantial" likelihood that the jury would have reached a different result if substance-abuse or mental-health evidence had been submitted. *Harrington*, 562 U.S. at 112. For this reason as well, it was not reasonably necessary to fund any further investigation, under § 3599(f), to pursue such evidence.

CONCLUSION

The Court should vacate the portion of the Fifth Circuit's judgment concerning petitioner's request for funding under 18 U.S.C. § 3599(f) and direct the Fifth Circuit to dismiss that portion of the appeal for lack of jurisdiction. Alternatively, the Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted.

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AUGUST 2017

STATUTORY APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 2254(e):

* * *

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

ECORD
AND
BRIEF

No. 16-6795 (CAPITAL CASE)

IN THE

Supreme Court of the United States

CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 2

I. THE LOWER COURTS DENIED MR. AYESTAS § 3599(f) SERVICES BASED ON AN INDEFENSIBLE READING OF THE STATUTE 2

A. The Substantial-Need Standard Is Not A Valid Construction Of § 3599(f) 2

B. Mr. Ayestas Established A Reasonable Need For Investigative Services 5

C. 28 U.S.C. § 2254(e)(2) Does Not Bar Mr. Ayestas's Request For § 3599(f) Services 8

II. APPELLATE COURTS HAVE JURISDICTION TO REVIEW A DISTRICT COURT'S DENIAL OF SERVICES UNDER § 3599(f) 14

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Ake v. Oklahoma,
470 U.S. 68 (1985) 20, 21, 22

Barrientes v. Johnson,
221 F.3d 741 (5th Cir. 2000) 12

Christeson v. Roper,
135 S. Ct. 891 (2015) 10, 21

Clark v. Johnson,
278 F.3d 459 (5th Cir. 2002) 23

Coleman v. Thompson,
501 U.S. 722 (1991) 13

Cullen v. Pinholster,
563 U.S. 170 (2011) 6

Davila v. Davis,
137 S. Ct. 2058 (2017) 13

Detrich v. Ryan,
740 F.3d 1237 (9th Cir. 2013) 11

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 16

Edwards v. Roper,
688 F.3d 449 (8th Cir. 2012) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

Fautenberry v. Mitchell,
572 F.3d 267 (6th Cir. 2009) 15

Flast v. Cohen,
392 U.S. 83 (1968) 20

Forrester v. White,
484 U.S. 219 (1988) 19

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 17

Freytag v. Comm'r of Internal Revenue,
501 U.S. 868 (1991) 18

Glover v. United States,
531 U.S. 198 (2001) 9

Harbison v. Bell,
556 U.S. 180 (2009) 21

Hayburn's Case,
2 U.S. (2 Dall.) 409 (1792) 17, 18

Henry v. Warden, Ga. Diagnostic Prison,
750 F.3d 1226 (11th Cir. 2014) 11

Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.,
134 S. Ct. 1744 (2014) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

Hohn v. United States,
524 U.S. 236 (1998) 22

Hooper v. Jones,
536 F. App'x 796 (10th Cir. 2013) 23

Japan Whaling Ass'n v. Am. Cetacean Soc'y,
478 U.S. 221 (1986) 19

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 12

Martel v. Clair,
565 U.S. 648 (2012) 2, 3, 4, 21

Martinez v. Ryan,
566 U.S. 1 (2012) ..... *passim*

McCleskey v. Zant,
499 U.S. 467 (1991) 4

McFarland v. Scott,
512 U.S. 849 (1994) 2, 10, 21

McWilliams v. Dunn,
137 S. Ct. 1790 (2017) 21

Miller v. French,
530 U.S. 327 (2000) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Murray's Lessee v. Hoboken Land & Improvement Co.,
59 U.S. (18 How.) 272 (1855) 19

Muskrat v. United States,
219 U.S. 346 (1911) 17

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015) 9

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 18

Postum Cereal Co. v. Cal. Fig Nut Co.,
272 U.S. 693 (1927) 18

Rhines v. Weber,
544 U.S. 269 (2005) 10

Rojem v. Workman,
655 F.3d 1199 (10th Cir. 2011) 23, 24

Slack v. McDaniel,
529 U.S. 473 (2000) 10

Smith v. Dretke,
422 F.3d 269 (5th Cir. 2005) 4

Stern v. Marshall,
564 U.S. 462 (2011) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Summers,
325 U.S. 561 (1945) 16

Thomas v. Union Carbide Agric. Prods. Co.,
473 U.S. 568 (1985) 19

Trevino v. Thaler,
133 S. Ct. 1911 (2013) 8, 11, 13, 14

United States v. Ferreira,
54 U.S. (13 How.) 40 (1852) 17, 18, 19

United States v. French,
556 F.3d 1091 (10th Cir. 2009) 23, 24

United States v. Schultz,
431 F.2d 907 (8th Cir. 1970) 15

United States v. Smith,
633 F.2d 739 (7th Cir. 1980) 24

United States v. Theriault,
440 F.2d 713 (5th Cir. 1971) 15

Ward v. Stephens,
777 F.3d 250 (5th Cir. 2015) 15

Wilkins v. Davis,
832 F.3d 547 (5th Cir. 2016) 23

TABLE OF AUTHORITIES (continued)

Page(s)

Williams v. Taylor,
529 U.S. 420 (2000) 12, 13

Zivotofsky ex rel. Zivotofsky v. Clinton,
566 U.S. 189 (2012) 19

CONSTITUTIONAL PROVISIONS

U.S. Const., art. III, § 2, cl. 1 15

STATUTES

18 U.S.C. § 3599(f) ..... *passim*

28 U.S.C. § 1254 16

28 U.S.C. § 1291 ..... 16, 24

28 U.S.C. § 2253(c) 10

28 U.S.C. § 2254(e)(2) ..... *passim*

OTHER AUTHORITIES

Hertz & Liebman, 1 *Federal Habeas Corpus Practice and Procedure* (6th ed. 2011) 14

REPLY BRIEF FOR PETITIONER

The reasonable-necessity standard governing access to services under 18 U.S.C. § 3599(f) supports the statutory guarantee of "representation" by providing the opportunity to develop claims and defenses. As the statute's text, structure, history, and purpose establish, indigent individuals seeking services under § 3599(f) must satisfy the reasonable-attorney standard that Congress incorporated from the Criminal Justice Act ("CJA"), not the Fifth Circuit's atextual substantial-need test. The Director does not attempt to defend the substantial-need test using traditional tools of statutory interpretation. She merely argues that substantiality requirements from unrelated habeas rules should be grafted onto § 3599(f). But courts do not rewrite statutes. Section 3599(f) means what it says: courts should authorize services when they are reasonably—not substantially—necessary for the representation.

The Director devotes little attention to the question actually presented in this case, focusing instead on peripheral issues that she never raised below. First, she asks this Court to hold that 28 U.S.C. § 2254(e)(2) bars the introduction of any evidence discovered using § 3599(f) services. The argument is both wrong and misplaced. A claimant with a *Martinez* excuse is not at fault for the failure to develop his claim's factual basis. And, as a general matter, a court should not prematurely resolve the application of § 2254(e)(2) on a § 3599(f) motion, before claims are developed. Second, the Director contends that Article III bars appellate review of the district court's reasonable-necessity determination. The

Court's Article III jurisprudence forecloses her argument. A district court's reasonable-necessity ruling bears the hallmarks of judicial decision-making. It is reviewable on appeal.

The Director's arguments should be rejected, and the judgment below reversed.

ARGUMENT

I. THE LOWER COURTS DENIED MR. AYESTAS § 3599(f) SERVICES BASED ON AN INDEFENSIBLE READING OF THE STATUTE

A. The Substantial-Need Standard Is Not A Valid Construction Of § 3599(f)

1. The substantial-need test contravenes Congress's purpose in § 3599(f) to *enhance* the representations of those facing capital punishment. *Martel v. Clair*, 565 U.S. 648, 659-60 (2012). The statute's plain language excludes a substantial-necessity requirement. So does the statute's structure: the "representation" provided by § 3599 encompasses the identification and development of *possible* claims. *See McFarland v. Scott*, 512 U.S. 849, 858 (1994). Congress borrowed § 3599(f)'s language from the CJA, under which "reasonable necessity" had a settled interpretation authorizing services when a reasonable attorney would seek them, not just when the underlying claim was fully developed. The statute itself forecloses the substantial-need test's requirement that a § 3599(f) movant definitively establish the merit and viability of the constitutional claim being developed. *See* Pet. Br. 23-43.

The Director does not seriously dispute that the substantial-need test fails scrutiny under the usual interpretive rules. She does not even contend that the substantial-need test can apply throughout the § 3599 representation. She instead argues that the test is a "permissible" reading of the statute when applied in habeas proceedings, particularly those involving *Martinez*. Opp. 17, 44-51. But the statute uses a single degree of necessity—reasonable—for all phases of a capital representation, even though the needs in any particular phase may vary. Pet. Br. 39-41. The Court presumes that Congress intended to give § 3599's language a single meaning in all contexts to which it applies. *See Martel*, 565 U.S. at 663. The Fifth Circuit's habeas-specific use of the substantial-need test is not a virtue—it confirms that the test is wrong. *See* Pet. Br. 39-41.

The Director's rationale for a substantial-need test unique to habeas proceedings also fails on its own terms. The Director contends that because a procedurally defaulted IATC claim must be "substantial" under AEDPA's appellate-review provision and *Martinez*, it follows that the need for services must likewise be "substantial." Opp. 17, 46. The argument is logically unsound. It also ignores that the AEDPA and *Martinez* substantiality requirements operate *after* an inmate has had the opportunity to develop his claims.[1] The § 3599(f)

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[1] *Martinez* contemplates that a petitioner may lack substantiation for his IATC claim when he arrives in federal court not because the claim is meritless, but because he has never had effective counsel to develop it. *Infra* at 13-14.

analysis, by contrast, necessarily occurs *before* claims have been fully identified and developed. The substantial-need test invites a court to prematurely resolve a habeas claim's merit and viability before it has been developed and pleaded with the benefit of the § 3599 representation, contrary to the statute's design. *Cf. McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (habeas counsel "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief").

At bottom, the Director argues that § 3599(f) should be narrowly construed in habeas proceedings because of AEDPA's restrictive purposes. But the provision at issue here traces to a statute designed to "enhance[] rights of representation." *Martel*, 565 U.S. at 659; *see* Pet. Br. 8-9. And Congress expressly reenacted the provision in AEDPA itself, Pet. Br. 8-9—confirming that Congress did not intend to narrow the scope of capital representations even as it narrowed access to relief in other ways.[2]

2. The Director's attack on the reasonable-attorney standard ignores the statutory history by

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[2] The Director argues that a technical amendment made in AEDPA to § 3599(f)'s predecessor—providing that courts "may" award reasonably necessary services—increased courts' discretion to deny § 3599(f) motions. Opp. 45. Even if this amendment could be construed as non-technical, it did not affect the meaning of reasonable necessity. *See Smith v. Dretke*, 422 F.3d 269, 289 (5th Cir. 2005). A court lacks discretion to base its ruling on a legally erroneous interpretation of a statute, or a rationale at cross-purposes with it. *See, e.g., Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014); *see also* Pet. Br. 43.

which it was incorporated into § 3599(f). *See* Pet. Br. 30-35. The Director simply argues that the standard should be rejected because it is "limitless." Opp. 49-50. But the reasonable-attorney standard is inherently bounded: reasonable attorneys do not deploy client resources for futile investigations. And after nearly *a half century* of experience with the standard, courts have developed workable, common-sense limitations. Courts reject frivolous requests and "fishing expeditions," for example, and they require the movant to demonstrate a reasonable basis for believing that the requested services may lead to the development of a plausible claim or defense. *See* Pet. Br. 42-43.

B. Mr. Ayestas Established A Reasonable Need For Investigative Services

The request here easily satisfies the reasonable-necessity standard. A reasonable attorney would devote the requested resources to Mr. Ayestas's *Wiggins* claim, based on what the existing record discloses about trial counsel's deficiency and the prejudice it likely caused.

1. The Director disputes that Mr. Ayestas has made a showing of deficiency worth investigating. The Fifth Circuit, however, justifiably assumed that Mr. Ayestas's trial counsel were deficient. After waiting almost a year and a half—until the eve of trial—to begin work on the case, trial counsel ignored red flags for substance abuse and mental illness, did not have Mr. Ayestas evaluated by a mental health professional, and otherwise failed to meaningfully investigate Mr. Ayestas's background

and social history. *See* Pet. Br. 10-13. As the Director concedes, the jury therefore heard *no* mitigating evidence during defense counsel's two-minute sentencing presentation, save for three two-sentence letters stating that Mr. Ayestas was attentive in his prison English course. *See* Pet. Br. 13; Opp. 4-5. Mr. Ayestas's federal habeas counsel reasonably questioned what evidence the threadbare trial investigation kept from the jury.[3]

2. The Director's arguments regarding prejudice are equally unavailing. The Director primarily argues that the brutality of the crime and Mr. Ayestas's criminal history would have neutralized the mitigating impact of mental-health and substance-abuse evidence for every juror. Opp. 56-57. But this Court's precedents consistently analyze—and often find—prejudice even in cases involving exceedingly brutal crimes. Pet. Br. 48. The focus in those cases

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[3] The Director raises two objections related to trial counsel's deficiency. First, she objects that the investigative report prepared for trial counsel, which documented several red flags, "was not introduced into evidence." Opp. 11. Mr. Ayestas has not yet had an opportunity to introduce *anything* into evidence, however—he is necessarily proceeding on allegations described in his papers, as the courts below each accepted. *See* JA 360-61, 379. Second, the Director argues that no evidence from Mr. Ayestas's Honduran family members can be considered because that evidence was not in the record before the state court when it rejected a different IATC claim. Opp. 54. That argument misapprehends the requested services, which concern *different* individuals. And it misconstrues *Cullen v. Pinholster*, 563 U.S. 170, 182-83 (2011), which restricts evidence on claims a state court decided on the merits. *Pinholster* is inapplicable to the new *Wiggins* claim at issue here, the merits of which the state court never decided.

is on the quality of the mitigating evidence, not the aggravating factors that the mitigation would counteract. *See* Capital Punishment Ctr. Br. 6-14.

The Director does not deny that *mental-health* evidence would be mitigating, which alone defeats the suggestion that any investigation is futile. And the Director's attack on the substance-abuse evidence is unsound. She argues that this evidence could have undermined the case for mitigation. Opp. 53, 57. She cannot argue, however, that *no* juror would have been moved by it, particularly since the State emphasized the *absence* of such evidence at the closing of the sentencing phase. *See* Pet. Br. 13. Evidence of Mr. Ayestas's substance abuse would have been uniquely effective alongside mental-health mitigation, as drug use is often tied to mental illness. *See* Pet. Br. 15. Indeed, *any* mitigating evidence would have made for a better sentencing-phase case than the one that trial counsel actually presented.

The Director's arguments about prejudice come to nothing, but the foregoing exercise illustrates the folly of debating the merits of a claim before each party has developed and presented its case. Congress structured § 3599 to avoid this exercise. Section 3599(f) movants are not required to prove up the claim they are trying to develop; it is sufficient here that Mr. Ayestas has made a showing of potential prejudice that a reasonable attorney would pursue. *Supra* at 2.

3. The Director further contends that state habeas counsel's failure to investigate Mr. Ayestas's mental health was "a reasonable strategic decision"

that forecloses his *Martinez* excuse. Opp. 55-56. The Fifth Circuit did not take this view: it held that state habeas counsel was adequate only because it concluded that the underlying IATC claim was frivolous. *See* JA 390, 399. State habeas counsel inexplicably failed to perform the mitigation investigation that his own investigator recommended when she learned that trial counsel had conducted "no social history investigation" and no investigation of "mental health, possible mental illness, [and] substance abuse history." JA 81. Mr. Ayestas alleged that state habeas counsel's failure to pursue that investigation was a non-strategic omission. It is impossible to make a contrary finding now, on this § 3599(f) motion, before Mr. Ayestas has even had the opportunity to develop and present evidence about state habeas counsel's performance.

C. 28 U.S.C. § 2254(e)(2) Does Not Bar Mr. Ayestas's Request For § 3599(f) Services

The Director's principal defense of the Fifth Circuit's decision is an argument neither raised nor decided below: that it is *never* reasonably necessary to conduct an investigation to develop allegations in support of a defaulted IATC claim, because 28 U.S.C. § 2254(e)(2) will bar admission of any discovered evidence. The Court need not and should not reach that argument here: it is forfeited; it would benefit from development in the lower courts; and it is premature.

The argument is also wrong; no appeals court has adopted it. Under *Martinez* and *Trevino*, a prisoner who never received adequate representation in state

court is not at fault for state habeas counsel's deficiencies, including any "failure to develop the factual basis" of his claims. Section 2254(e)(2) therefore would not prevent a court from considering the evidence that § 3599(f) services produce here.

1. This case is not a suitable vehicle for exploring the interplay between § 2254(e)(2) and § 3599(f)'s reasonable-necessity standard, for multiple reasons.

First, the Director never argued below that § 2254(e)(2) should factor into the reasonable-necessity determination. She has therefore forfeited the argument. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 398 (2015).

Second, this is precisely the sort of question that the lower courts can and should consider in the first instance. *See, e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001) (declining to consider arguments "neither raised in nor passed upon by the Court of Appeals" and reserving for lower courts the questions "[w]hether these issues remain open, and if so whether they have merit"). The degree to which § 2254(e)(2) could affect the use of evidence uncovered through § 3599(f) services, and the question whether there is a need for § 3599(f) services in a given case notwithstanding the potential unavailability of an evidentiary hearing, involve context-specific analyses that the lower courts should undertake first.

Third, it is inappropriate to resolve possible downstream procedural bars on a § 3599(f) motion. Section 2254(e)(2)'s applicability in a given case—including the applicability of its subsections—will

depend on a petitioner's investigation, which in turn will depend on whether he has the resources to conduct it. As this Court has recognized, § 3599 rights to representation do not dissolve simply because the petitioner's claims may later encounter procedural hurdles. *See Christeson v. Roper*, 135 S. Ct. 891, 895-96 (2015) (petitioner who would "face[] a host of procedural obstacles to having a federal court consider his habeas petition" should "have th[e] opportunity [to overcome them], and is entitled to the assistance of ... counsel in doing so").

Fourth, this case does not provide an opportunity to test the Director's interpretation of § 2254(e)(2). An investigation can be reasonably necessary to the "representation" for reasons that do not implicate § 2254(e)(2). Most basically, a § 3599 representation encompasses the research and identification of "possible claims and their factual bases." *McFarland*, 512 U.S. at 855; *see* Pet. Br. 9. That effort may establish that the underlying constitutional grievance is sufficiently "substantial" to warrant an appeal. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473 (2000). Or it may reveal that the federal proceedings should be held in abeyance for exhaustion of an identified claim. *See Rhines v. Weber*, 544 U.S. 269 (2005).

In this case, the requested services are reasonably necessary to the development not only of Mr. Ayestas's underlying claim, but also of an excuse to its procedural default. As the Director concedes, Mr. Ayestas may present new evidence to establish the *Martinez* excuse—the ineffectiveness of state habeas counsel and the substantiality of the underlying

IATC claim—even if that claim is ultimately submitted based on the state record. Opp. 40 n.18; *see Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) ("If the district court holds an evidentiary hearing before ruling on the *Martinez* motion, evidence received at that hearing is not subject to the usual habeas restrictions on newly developed evidence."); *Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1231-32 (11th Cir. 2014) ("When a petitioner asks for an evidentiary hearing on cause and prejudice, neither section 2254(e)(2) nor the standard of cause and prejudice that it replaced apply.").

2. If it were appropriate to reach the Director's new argument, it would have to be rejected.[4] No court of appeals has adopted the Director's proposed construction of the opening clause of § 2254(e)(2), because *Martinez* and *Trevino* recognize that a prisoner who has never had adequate state representation is not "at fault" for a forfeited IATC claim. Since § 2254(e)(2) is a fault-based restriction, it does not preclude the use of facts developed in a federal habeas proceeding—including through § 3599(f) services—to support a faultless prisoner's constitutional claims. The Director's interpretation cannot be reconciled with *Martinez*, *Trevino*, or the unbroken line of authority confirming that a prisoner whose lack of fault excuses a procedural default also lacks fault for

[4] Mr. Ayestas does not in this brief argue that he would satisfy the exceptions specified in the subsections of § 2254(e)(2), but reserves the right to argue that he does if discovered facts support that position.

"fail[ing] to develop" a claim within the meaning of § 2254(e)(2).

The opening clause of § 2254(e)(2) limits the availability of evidentiary hearings only when a habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." In *Williams v. Taylor*, 529 U.S. 420 (2000), the Court explained that "failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. Before AEDPA, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), equated the fault-based standard for excusing procedural default with the fault-based standard used to determine the availability of evidentiary hearings. Interpreting AEDPA in *Williams*, the Court found "no basis in the text of § 2254(e)(2) to believe Congress used 'fail' in a different sense than the Court did in *[Tamayo-Reyes]*," *Williams*, 529 U.S. at 433, and "s[aw] no indication that Congress ... intended to remove the distinction between a prisoner who is at fault and one who is not," *id.* at 435. *Williams*, in short, reaffirmed the longstanding alignment between the excuse of a procedural default and the opportunity to receive a hearing on the merits in federal court: each turns on the absence of fault. *See, e.g.*, *Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) (recognizing that *Williams* "linked the 'failure to develop' inquiry with the cause inquiry for procedural default," and holding that petitioner who establishes cause has also shown he did not "fail to develop" the record).

When *Williams* was decided, habeas claimants were always vicariously faulted for state habeas counsel's deficiency. *Williams*, 529 U.S. at 432; *see Coleman v.* Thompson, 501 U.S. 722, 754 (1991). *Martinez* revised that rule, however, explicitly "qualif[ying] *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of [an IATC claim]." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *see also Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (describing *Martinez* as an exception to the rule that "[a]ttorney error that does not violate the Constitution ... is attributed to the prisoner"). Because a prisoner with a *Martinez*-postured claim is not at "fault" for the procedural default, he has not "failed to develop" his claim for purposes of § 2254(e)(2).

Martinez and *Trevino* themselves clearly contemplate fact development that would be impossible if § 2254(e)(2) operated as the Director claims. *Martinez* addresses the problem that prisoners deprived of adequate state post-conviction counsel are "in no position to *develop the evidentiary basis* for a claim of ineffective assistance." 566 U.S. at 12 (emphasis added). Martinez himself needed to present new evidence in federal court for his challenge to trial counsel's failure to use a rebuttal expert. *Id.* at 7. *Trevino*, which involved the same type of forfeited *Wiggins* claim at issue here, is even clearer on this point. The Court not only listed the wealth of new evidence that would have to be considered if Trevino's claim were not treated as defaulted, *Trevino v. Thaler*, 133 S. Ct. 1911, 1916 (2013), but also more broadly rec-

ognized that a lawyer undertaking *Wiggins* litigation must "investigate [a claimant's] background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances," *id.* at 1919. The Director's reading of § 2254(e)(2) would ensure that "no court will review" many potentially meritorious claims, *Martinez*, 566 U.S. at 10-11—exactly the result that *Martinez* and *Trevino* are supposed to prevent.

The Director insists that her view of § 2254(e)(2) is necessary to give effect to *Williams*'s observation that AEDPA "raised the bar" for federal habeas petitioners. Opp. 41. But § 2254(e)(2) "raises the bar" regardless. It altogether forecloses hearings in circumstances that previously would have permitted them. *See* Hertz & Liebman, 1 *Federal Habeas Corpus Practice and Procedure* § 20.2[b], at 1036 & n.24 (6th ed. 2011). When fault is properly attributable to the inmate, § 2254(e)(2) requires the inmate to show more to secure a hearing than was required under pre-AEDPA law. *Id.* at 1036. The Director's reading of § 2254(e)(2) is untenable and unnecessary. Only Mr. Ayestas's interpretation is faithful to Congress's intent and the Court's cases effectuating it.

II. APPELLATE COURTS HAVE JURISDICTION TO REVIEW A DISTRICT COURT'S DENIAL OF SERVICES UNDER § 3599(f)

The Director devotes much of her brief to renewing her argument—offered in opposing certiorari but not below—that courts lack appellate jurisdiction to

review a reasonable-necessity ruling that withholds § 3599(f) services. *See* Cert. Opp. 27-28. The argument is meritless, as the Court presumably concluded in granting certiorari.

No federal circuit refuses appellate jurisdiction to review a reasonable-necessity determination withholding § 3599(f) services. To the contrary, the courts of appeals regularly exercise jurisdiction to review such determinations. *See, e.g.*, *Ward v. Stephens*, 777 F.3d 250, 265-66 (5th Cir. 2015); *Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012); *Fautenberry v. Mitchell*, 572 F.3d 267, 268-69 (6th Cir. 2009). They likewise routinely reviewed orders withholding services under § 3599(f)'s predecessor provision in the CJA. *See, e.g.*, *United States v. Theriault*, 440 F.2d 713 (5th Cir. 1971); *United States v. Schultz*, 431 F.2d 907 (8th Cir. 1970). This long line of appellate decisions is faithful to well-established jurisdictional principles, which confirm appellate jurisdiction here.

1. Article III "extend[s]" the federal courts' "judicial power" to certain "cases" and "controversies." U.S. Const., art. III, § 2, cl. 1. Exercising its Article III judicial power over Mr. Ayestas's habeas "case," the district court resolved his § 3599(f) motion against him. Every feature of the § 3599(f) determination confirms that it was part of the "case," made part of the final judgment by the district court, and not a separate administrative order. The § 3599(f) ruling appears under the caption and on the docket assigned to Mr. Ayestas's habeas case; it was made in the name of the court, as part of the same "Memorandum and Order" resolving Mr. Ayestas's claims

on the merits, which was the basis for the January 26, 2011 final judgment; and it involved the interpretation and application of the same constitutional provisions and federal statutes that govern relief on the underlying *Wiggins* claim. The § 3599(f) order was part of one judicial proceeding, throughout which the district court exercised judicial power.

Because the § 3599(f) determination was part of the final decision in Mr. Ayestas's case, the Fifth Circuit had appellate jurisdiction to review it. Federal courts of appeals have jurisdiction to review "all final decisions of the district courts of the United States." 28 U.S.C. § 1291; *see also id.* § 1254 (providing for Supreme Court review of "[c]ases in the courts of appeals"). Their jurisdiction encompasses the review of "claims of district court error at any stage of the litigation." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). Article III likewise permits appellate review of all district court orders entered in the "case." *See In re Summers*, 325 U.S. 561, 565-66 (1945) (Article III permits appellate jurisdiction where there is a "judgment in a judicial proceeding which involves a case or controversy"). There is thus no constitutional or statutory impediment to this Court's exercise of jurisdiction here.

2. The Director asserts that there is no appellate power to review the reasonable-necessity determination made in the district court proceeding because, she says, a district court making such a determination acts in a purely administrative capacity. Opp. 18-28. That contention is unsupportable.

a. The Director starts from an incorrect premise: that individual rulings may be splintered from a judicial proceeding and examined for indicia of judicial decision-making.

Constitutionally significant adverseness is a property of a case, not an issue, as the Director's decisions confirm. *See, e.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755 (1976) (parties in class action remained adverse and case justiciable even though named class member was no longer entitled to relief against defendant); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (suit to invalidate a federal land grant non-justiciable when not instituted against party with the adverse ownership claim); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 45, 47 (1852) (proceeding in which treaty claims were decided entirely *ex parte* in an Article I tribunal, the rulings of which were subject to the Treasury Secretary's review); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409-10 & n.* (1792) (proceeding in which courts set pensions for disabled Revolutionary War veterans in wholly *ex parte* proceedings that were reviewable by a Secretary of War). When a district court makes a ruling in an Article III case, it is part of the final decision in that case and the question acted on is "presented in an adversary context." *Franks*, 424 U.S. at 755.

The Director also cites cases involving review by the executive and legislative branches to argue that reasonable-necessity decisions are non-judicial acts. That precedent addresses scenarios in which the *final judgment in the case* can be revised outside the Article III hierarchy. *See, e.g., Miller v. French*, 530 U.S. 327, 342 (2000) ("Article III gives the Federal

Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy" (quotation omitted)); *cf. Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 891 (1991) (proceeding before Article I Tax Court involved exercise of "judicial power" in part because final judgment reviewable only by Article III courts); *Postum Cereal Co. v. Cal. Fig Nut Co.*, 272 U.S. 693, 698-99 (1927) (proceeding under Article I jurisdiction of D.C. Court of Appeals to review decision of Patent Commissioner not a "final judgment," because it could be overridden via a bill in equity brought in district court). That precedent is inapplicable here, where the non-judicial branches have no power over the final judgment in Mr. Ayestas's habeas case (or even over the reasonable-necessity ruling, as explained *infra* at 20-21). *Compare Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (legislative revision); *Ferreira*, 54 U.S. (13 How.) at 45, 47 (revision by Treasury Secretary); *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.* (revision by War Secretary).

b. Even if issues within a case could be individually examined for indicia of judicial power, a district court's reasonable-necessity determination would unquestionably pass that test. The district court's § 3599(f) determination here turned on the court's application of the statutory standard to issues that were inextricably intertwined with Mr. Ayestas's underlying claim for habeas relief and energetically disputed by the parties. That "careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of [a

federal claim] ... is what [federal] courts do." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *see Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).[5]

The Director argues that because § 3599(f) motions can be submitted *ex parte*, they are necessarily non-adverse and their resolution is insufficiently "judicial." Her argument would be incorrect even if the entire *proceeding* were *ex parte*. *See Forrester v. White*, 484 U.S. 219, 227 (1988) (the "*ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character"); *compare Ferreira*, 54 U.S. (13 How.) at 46-47 (*ex parte* proceeding in Article I tribunal). But § 3599(f) determinations are not always made *ex parte*, as the Director concedes (Opp. 22)—the statute requires a judicial finding that confidentiality is necessary. And this case demonstrates that, even for those § 3599(f) requests that are resolved *ex parte*, the process is adversarial: the State frequently contests both *ex parte* treatment and the ultimate entitlement to services, as well as the underlying facts and law necessary to award relief. Indeed, the Director formally opposed Mr. Ayes-

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[5] The Director argues that finding facts and applying law is not necessarily an exercise of "Article III judicial power," relying on "public rights" cases where Congress had assigned an adjudicative function to a non-Article III entity. Opp. 20 & n.5; *see Stern v. Marshall*, 564 U.S. 462, 490 (2011); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585-86 (1985); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 275, 280-81 (1855). Those cases are inapplicable to this appeal of an Article III court's decision in a federal habeas dispute, which is self-evidently not a "public rights" case.

tas's request for § 3599(f) services in the district court and continues to oppose it now. That request—even if it could properly be considered in isolation—was made "in an adversary context." *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *see also Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (entitlement to a mental-health expert may be demonstrated through "an *ex parte* threshold showing to the trial court"); Opp. 26 n.11 (conceding *Ake* determination is appealable).

The Director also argues that a district court's decision to withhold § 3599(f) services is subject to review "outside the traditional Article III judicial hierarchy," and is therefore "administrative." Opp. 23. This argument would fail even if the reasonable-necessity determination could be excised from the case, *but see supra* at 17-18. The statutory predicate for the Director's argument, § 3599(g)(2), does not provide for chief circuit judge review of reasonable-necessity determinations. It only requires the chief judge to review any portion of funding awarded *above* $7,500, and even then only to confirm that the services those dollars would support are "for an unusual character or duration." The statute indicates that review of reasonable-necessity determinations proceeds under the ordinary rules of appellate jurisdiction: § 3599(f) itself provides that, if a motion is resolved *ex parte*, the relevant request and communications must be transcribed "and made a part of the record available for appellate review." Even if the Director were correct that § 3599(g)(2) somehow eliminates appellate review on the narrow funding-amount issue it actually addresses, the reasonable-

necessity determination would remain reviewable by the appellate courts.[6]

3. The Director's jurisdictional position is also at odds with appellate courts' well-established practice of reviewing decisions involving both § 3599's appointment-of-counsel provisions and the constitutional entitlement to a mental-health expert.

This Court has repeatedly exercised jurisdiction in appeals involving interpretation of § 3599's counsel-appointment provisions. *See, e.g.*, *Christeson*, 135 S. Ct. at 894; *Martel*, 565 U.S. at 658-59; *Harbison v. Bell*, 556 U.S. 180, 185-86, 194 (2009); *see also McFarland*, 512 U.S. at 854 (predecessor provision). The Director's only response is to assert that appointing counsel is "inherently" judicial. Opp. 29. She never explains what makes it so, except to note that courts have long performed that function. That line-drawing principle dooms her argument here: for over thirty years courts have been required to provide qualifying defendants with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83; *see also McWilliams v. Dunn*, 137 S. Ct. 1790, 1799-800 (2017) ("overwhelming majority" of Ameri-

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[6] The Director argues that Congress may have wished to preserve the § 3599(f) record for review of issues other than the § 3599(f) determination. Opp. 30-31. The Director's construction would not help her even if it were plausible, because she identifies nothing in the statute vesting review of reasonable-necessity determinations outside the Article III hierarchy—the very basis for her argument that some judge-made decisions are non-reviewable.

can jurisdictions provide "a qualified expert retained specifically for the defense"). And like the appointment of counsel, determining whether § 3599(f) services are reasonably necessary is indispensable to the client "representation," which in turn protects constitutional rights and prevents unjust punishment.[7]

The Director thus gains nothing by highlighting the "constitutional basis" of an *Ake* determination—the appealability of which she concedes—as a reason for distinguishing it. Opp. 26 n.11. A litigant seeking reasonably necessary services under § 3599(f) seeks a judicial determination of the same fundamental nature as one seeking services under *Ake*. The judicial quality of a decision does not turn on whether the law requiring it is statutory or constitutional—it turns on the nature of the activity itself. *See Hohn v. United States*, 524 U.S. 236, 245 (1998).

4. Finally, the Director cites two Tenth Circuit cases which, she says, show that the lower courts have "unanimously" held that § 3599(f) determinations are unreviewable. Opp. 26-27. Again, the Director is wrong.

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[7] The Director's characterization of § 3599(f) as a "public benefit program" for attorneys (Opp. 21, 27) is legally meaningless. By the Director's own analysis, the judicial character of a decision to provide § 3599(f) services is no less "inherent" than that of a decision to appoint counsel—they are both explicit components of the statutory "representation." The label is also particularly inapt here, given that attorneys neither perform nor are compensated for services authorized under § 3599(f).

The cited cases involved challenges to the *amount* of funding awarded; they do not establish a jurisdictional rule for determinations *whether* § 3599(f) services are reasonably necessary. *See Rojem v. Workman*, 655 F.3d 1199, 1202 (10th Cir. 2011) (holding no jurisdiction to review ruling on § 3599(f) request that "boil[ed] down to a dispute about the district court's decision to award an amount less than the requested amount for representation"); *United States v. French*, 556 F.3d 1091, 1094 (10th Cir. 2009) (holding, in CJA attorneys-fees context, that court lacked appellate jurisdiction over dispute about "the amount of payment"). As the Tenth Circuit itself recognizes, the decision to deny services on the ground that they are not reasonably necessary (and, under the CJA, the decision not to compensate counsel) *is* reviewable on appeal. *Hooper v. Jones*, 536 F. App'x 796, 798-99 (10th Cir. 2013). It is "a mistake," the Tenth Circuit has explained, "to equate" the "decision *whether* to compensate counsel" with "the ad hoc administrative act of signing off on the amount requested in a particular CJA voucher." *Id.* at 798 (emphasis added). The "whether" decision involves "interpretation and application of statutory directives," which "is the very essence of district court decision-making routinely reviewable under § 1291." *Id.*; *see Wilkins v. Davis*, 832 F.3d 547, 559 (5th Cir. 2016); *Clark v. Johnson*, 278 F.3d 459, 460-61 (5th Cir. 2002).

The Tenth Circuit authority the Director cites, moreover, is rooted in cases involving requests for attorneys' fees made *after* the underlying proceedings had concluded. *See Rojem*, 655 F.3d at 1201-02

(relying on *French*); *French*, 556 F.3d at 1093 (holding no jurisdiction to review CJA attorneys-fee awards and citing cases). In that context, the funding request is a separate proceeding outside the original "case." The attorneys-fees cases therefore had to confront the question whether there was a judicial proceeding producing an appealable final decision within the meaning of 28 U.S.C. § 1291 at all. *See, e.g.*, *United States v. Smith*, 633 F.2d 739, 741 (7th Cir. 1980) (noting that attorney-compensation requests are "usually made at the close of the court proceedings when the client's rights have been adjudicated" and looking for "indicia accompanying an adversary proceeding"). Section 3599(f) requests, by contrast, are made in an ongoing "case," a distinction the Tenth Circuit ignored in *Rojem*. Regardless, as explained, even the Tenth Circuit agrees that there is jurisdiction to review a reasonable-necessity determination. There is jurisdiction here.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

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IN THE
Supreme Court of the United States

CARLOS MANUEL AYESTAS,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE (INSTITUTIONAL DIVISION),

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. INVESTIGATION TO DEVELOP POTENTIALLY MERITORIOUS CLAIMS IS AN ESSENTIAL ROLE AND DUTY OF FEDERAL POST-CONVICTION COUNSEL 6

II. INVESTIGATION OFTEN REQUIRES SPECIALIZED SERVICES FOR WHICH INDIGENT PETITIONERS LACK FUNDS 17

III. THE FIFTH CIRCUIT'S "SUBSTANTIAL NEED" TEST BLOCKS ESSENTIAL FUNDING AND PREVENTS COUNSEL FROM MEETING THEIR ETHICAL OBLIGATIONS 24

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Ayestas v. Stephens,
817 F.3d 888 (5th Cir. 2016) 25, 26, 27

Ayestas v. Stephens,
826 F.3d 214 (5th Cir. 2016) 27

Brumfield v. Cain,
135 S. Ct. 2269 (2015) 13, 14

Christeson v. Roper,
135 S. Ct. 891 (2015) 29

Ex parte Varelas,
45 S.W.3d 627 (Tex. Crim. App. 2001) 7

Fowler v. Joyner,
753 F.3d 446 (4th Cir. 2014) 26

Goodwin v. Balkcom,
684 F.2d 794 (11th Cir. 1982) 6-7

Guy v. Dretke,
No. CIV.A. 5:00-CV-191-C, 2004 WL
1462196 (N.D. Tex. June 29, 2004).....14

Hodges v. Epps,
No. 1:07CV66-MPM, 2010 WL 3655851
(N.D. Miss. Sept. 13, 2010) 15-16

Lockett v. Ohio,
438 U.S. 586 (1978) 13

Martel v. Clair,
565 U.S. 648 (2012) 19

Martinez v. Ryan,
566 U.S. 1 (2012) 7, 8, 18

McCleskey v. Zant,
499 U.S. 467 (1991) 7

McFarland v. Scott,
512 U.S. 849 (1994) 7, 10, 18, 19

In re Paredes,
587 F. App'x 805 (5th Cir. 2014) 26

Porter v. McCollum,
558 U.S. 30 (2009) 22

Rompilla v. Beard,
545 U.S. 374 (2005) 6, 9, 11

Strickland v. Washington,
466 U.S. 668 (1984) 6, 9

Trevino v. Thaler,
133 S. Ct. 1911 (2013) 7, 8, 17, 18, 29

Wiggins v. Smith,
539 U.S. 510 (2003) ..... passim

Williams v. Taylor,
529 U.S. 362 (2000) ..... passim

STATUTES

18 U.S.C. § 2254 2

18 U.S.C. § 3599 ..... passim

OTHER AUTHORITIES

134 Cong. Rec. H7285 20

141 Cong. Rec. S7819 20

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) ..... passim

ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992). 2, 9, 13

ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers* (Mar. 2013) 16

Am. Bar Ass'n, Lawyer Demographics – Year 2016, http://goo.gl/CRsjXL 16

AM. BAR ASS'N, TEXAS DEATH PENALTY ASSESSMENT REPORT 27-28

Birmingham, Alabama Hearing Before the Judicial Conference of the United States Committee to Review the Criminal Justice Act Program (Feb. 18, 2016) 18, 24

Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation, 36 Hofstra L. Rev. 1035 (2008) 22

Death Row Inmate Wins Sympathy, Chi. Trib., June 23, 2004.....14

Habeas Corpus Issues: Hearing Before the House of Representatives Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, 102nd Cong. (July 17, 1991)..... 20-21

Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists, 30 Okla. City U. L. Rev. 23 (2005).....23

Order, *Tong v. Stephens*, No. 4:10-cv-2355 (S.D. Tex. Sept. 22, 2014).....28

Pet. for Review of Denial of PCR, *Arizona v. Carreon*, 2016 WL 1603009 (Mar. 14, 2016).....15

Pro Bono Publico: The Growing Need for Expert Aid, 60 S.C. L. Rev. 493 (2008).....23

INTEREST OF *AMICUS CURIAE*

The American Bar Association is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States.[1] Its more than 400,000 members come from all fifty states and other jurisdictions. They include prosecutors, public defenders, and private defense counsel, as well as attorneys from law firms, corporations, non-profit organizations, and governmental agencies. The ABA's membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2] Its mission is, in part, to serve the public and the legal profession by advocating for the ethical and effective representation of all clients.

The ABA's rules of professional conduct include guidelines and standards for the representation of clients in the criminal justice system generally, and specifically in the uniquely complex and high-stakes context of capital litigation. The Guidelines for the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certify that they authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have granted blanket consent to the filing of amicus briefs.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

Appointment and Performance of Defense Counsel in Death Penalty Cases, which were first adopted as ABA policy in 1989 and revised in 2003 ("ABA Death Penalty Guidelines"),[3] set forth a baseline for effective representation at every stage of a capital case and have been widely adopted by state and local bar associations and indigent defense organizations, and by court rule in many death penalty jurisdictions. The ABA Standards for Criminal Justice ("ABA Criminal Justice Standards")[4] also provide guidance on professional conduct based on the consensus views of a broad array of criminal justice professionals.

The ABA's focus has been and remains on ensuring that all clients, including capital habeas petitioners, receive quality legal representation. The ABA has provided testimony in support of the provision of funding for indigent criminal defense under the Criminal Justice Act of 1964 ("CJA"), as well as the higher funding levels for capital cases authorized by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For more than thirty years, the ABA Death Penalty Representation

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[3] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003).

[4] ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992). The ABA published a revised edition of these standards in 2015; the guidelines cited herein, however, reflect the professional standards under which Mr. Ayestas's federal habeas counsel was obligated to operate in pursuing his application under 18 U.S.C. § 2254 and his motion for funds under 18 U.S.C. § 3599(f).

Project also has worked to improve the quality and availability of counsel in death penalty cases by recruiting counsel from law firms to represent capital clients. ABA-recruited counsel have represented over 300 individuals in capital cases, most of them in the post-conviction context. Additionally, in 2001, the ABA established the Death Penalty Due Process Review Project to research and educate the public and decision-makers on the operation of capital jurisdictions' laws and processes in order to promote fairness and accuracy in death penalty systems.

One of the recurring themes repeatedly observed by ABA-recruited pro bono counsel in capital cases, and by the various assessment teams reviewing the states' capital judicial systems, is ineffective representation resulting from inability to investigate a client's background adequately. This problem is seriously exacerbated by the Fifth Circuit's "substantial need" standard, which effectively prevents counsel from obtaining funds needed for investigation unless counsel first proves the facts that counsel needs the requested funding to develop.

The ABA, as *amicus curiae*, respectfully submits this brief in support of the Petitioner. While the ABA takes no position on the death penalty itself, the ABA urges the Court to ensure that counsel for indigent capital prisoners in federal habeas corpus proceedings – a critical and highly complex stage of litigation – are able to discharge their professional responsibilities and secure funds for the reasonably necessary services to which their clients are entitled.

SUMMARY OF ARGUMENT

Well-established standards of professional conduct, recognized in this Court's jurisprudence, require that counsel conduct an independent and adequate investigation of the facts at each stage of a case. The unusually high stakes and complex requirements of capital habeas litigation make such investigations particularly essential in federal habeas proceedings – never more so than when petitioner's claim is that prior counsel conducted an inadequate investigation. Importantly, this Court has recognized, and professional standards make clear, that counsel must conduct an adequate investigation *prior* to making ultimate strategic determinations about which claims to present and how. The life-or-death importance of investigation in capital habeas litigation is starkly illustrated by the numerous cases in which habeas petitioners with meritorious claims initially failed to obtain relief based on the inadequacy of resources to investigate those claims.

This Court also has recognized, and professional standards support, the judgment Congress made in 18 U.S.C. § 3599(f): to ensure that federal habeas serves its rights-protecting function and that the statutory guarantee of counsel in those proceedings is meaningful, petitioners are entitled to "reasonably necessary" services to support their representation. This statutory authorization of funding is essential because federal habeas counsel generally lacks the expertise, and frequently lacks the time, to carry out all tasks necessary for an investigation. Professional standards generally recommend that counsel secure

the services of investigators, mitigation specialists, and other experts as needed to ensure effective representation.

Despite the importance of investigation in federal habeas and the clear need for reasonably necessary services to accomplish its aims, the Fifth Circuit has imposed a restrictive and circular "substantial need" rule that threatens effective representation in this crucial stage of capital litigation. As propounded by the Fifth Circuit, including in this case, the "substantial need" rule effectively requires counsel to establish a viable claim on the merits before the Circuit will authorize the funding needed to investigate the merits. If permitted to stand, the Fifth Circuit's approach will make it extraordinarily difficult or impossible for counsel representing federal habeas petitioners to meet their professional responsibilities and will jeopardize the ability of federal habeas litigation to ensure the integrity, fairness, and reliability of capital convictions and sentences.

ARGUMENT

An attorney representing a death row prisoner in federal habeas proceedings has a duty to investigate and develop potentially meritorious claims. In many cases, the investigation requires specialized services such as mitigation specialists, investigators, and mental health experts, in addition to attorneys' work. Without access to adequate funding for reasonably necessary services, counsel will be unable to meet minimum professional standards for effective representation of prisoners in capital

habeas proceedings. The Fifth Circuit's restrictive and circular "substantial need" test effectively prevents counsel representing indigent petitioners from fulfilling their professional responsibilities in this critical stage of proceedings, thereby increasing the risk of an unjust execution.

I. INVESTIGATION TO DEVELOP POTENTIALLY MERITORIOUS CLAIMS IS AN ESSENTIAL ROLE AND DUTY OF FEDERAL POST-CONVICTION COUNSEL

This Court has repeatedly confirmed what professional standards explicate: A core function of federal post-conviction counsel is to investigate claims which may have merit so that strategic decisions can be made and substantial claims for relief can be developed and presented to federal courts. Rather than investigating only those claims counsel knows from the outset will prove viable on both deficient-performance and prejudice grounds, counsel is duty-bound to conduct a reasonable investigation to determine which potential claims, if any, are ultimately viable on the merits.

Criminal defense counsel at all stages of proceedings have a "duty to investigate" issues related to guilt and punishment, and counsel's performance of that duty is crucial to ensuring adequate representation. *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see also Rompilla v. Beard*, 545 U.S. 374, 380 (2005) ("This case, like some others recently, looks to norms of adequate investigation . . . ."). As the Eleventh Circuit has observed, a defense attorney's "independent duty to

investigate and prepare" is "[a]t the heart of effective representation." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982).

In preparing a federal habeas petition, counsel "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *see also* ABA Death Penalty Guideline 10.15.1(C) (habeas counsel "should seek to litigate all issues, whether or not previously presented, that are arguably meritorious"). The importance of this duty is heightened in the federal habeas context by doctrines of waiver and abuse of the writ. *See McFarland v. Scott*, 512 U.S. 849, 860 (1994) (O'Connor, J., concurring).

"Claims of ineffective assistance" in particular "often require investigative work" to develop facts that may not appear in the record or in the files of ineffective prior attorneys. *Martinez v. Ryan*, 566 U.S. 1, 11 (2012). Indeed, "the inherent nature of most ineffective assistance of trial counsel claims means that the trial court record will often fail to contain the information necessary to substantiate the claim." *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (internal quotation marks omitted); *see also Ex parte Varelas*, 45 S.W.3d 627, 629-30 (Tex. Crim. App. 2001) ("In most cases, the record on direct appeal is inadequate to develop an ineffective assistance claim because the very ineffectiveness claimed may prevent the record from containing the information necessary to substantiate a claim." (internal quotation marks omitted)).

It follows that, in pursuing the limited procedural-default exception this Court identified in *Martinez* and *Trevino* – which is available only where, *inter alia*, "'there was no counsel'" in state habeas "'or counsel in that proceeding was ineffective,'" *Trevino*, 133 S. Ct. at 1921 (quoting *Martinez*, 566 U.S. at 17) – federal habeas counsel must investigate to identify "the information necessary to substantiate the claim" not effectively pursued below, *id.* at 1918 (internal quotation marks omitted). An adequate investigation by federal habeas counsel is especially critical where, as here, petitioner's claim is that his prior counsel conducted an inadequate, unreasonably narrow investigation. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534, 538 (2003) (counsel's inadequate investigation did not reflect reasonable professional judgment and prejudiced the defendant at sentencing); *see also* ABA Death Penalty Guideline 1.1, cmt. at 933 ("Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case.").

In recognizing this obligation and defining its parameters, the Court has looked to prevailing norms of practice as reflected in ABA professional guidelines and standards. *See, e.g.*, *Wiggins*, 539 U.S. at 524 (finding counsel's investigation in connection with capital sentencing was unreasonable in light of "well-defined norms" discussed in ABA guidelines). The ABA guidelines and standards serve as "guides to determining what is reasonable," and what obligations are incumbent upon an attorney who agrees to undertake a capital

representation. *Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524; *Strickland*, 466 U.S. at 688; *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing ABA Standards for Criminal Justice to support determination that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background").

The importance of habeas counsel's duty to investigate is well-supported in the ABA Death Penalty Guidelines and the ABA Criminal Justice Standards. The ABA Death Penalty Guidelines "applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases," providing explicit and "forceful directive[s]" for capital counsel. *Rompilla*, 545 U.S. at 387 n.7. "[T]hese Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases." ABA Death Penalty Guideline 1.1, History of Guideline.

Post-conviction counsel has an "ongoing obligation[]" to conduct a thorough and independent investigation of the case, and to review continually whether prior counsel's theory of the case should be modified in light of subsequent developments. ABA Death Penalty Guidelines 10.7(A), 10.15.1(E); *see also Wiggins*, 539 U.S. at 522 (discussing counsel's duty to conduct a thorough investigation). To fulfill this obligation, "[t]wo parallel tracks of post-conviction investigation are required." ABA Death Penalty Guideline 10.15.1, cmt. at 1086. One track focuses on "the capital case," including prior counsel's performance at trial and in any state post-

conviction proceedings. *Id.; see also id.* Guideline 10.7(B)(1) (counsel must investigate "the defense provided to the client at all prior phases of the case"). The other track "focuses on the client," with the goal of "assembling a more-thorough biography of the client than was known at the time of trial," which allows counsel to identify "mitigation that was not presented previously." *Id.* Guideline 10.15.1, cmt. at 1086. To develop potential claims at this stage, "collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation." *Id.* at 1085. Indeed, to the extent counsel determines the official record of proceedings is not complete, counsel has a duty to "supplement it as appropriate." *Id.* Guideline 10.7(B)(2).

Importantly, this Court has recognized that one reason the duty to investigate is essential is that it enables counsel to advise the client and to make strategic decisions regarding a representation. *See, e.g., Wiggins*, 539 U.S. at 523 ("[W]e focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable."); *Williams*, 529 U.S. at 396 (counsel's failure to uncover and present mitigating evidence at sentencing was not justifiable as a tactical decision because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background"); *McFarland*, 512 U.S. at 855 ("The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.").

Investigation is "necessary to making an informed choice among possible defenses," not only in the guilt stage but also at sentencing. *Wiggins*, 539 U.S. at 511.

The ABA Death Penalty Guidelines likewise are clear that habeas counsel should conduct a thorough investigation *before* determining which claims are viable and should be raised in a petition. *See* ABA Death Penalty Guideline 10.8(A)(2). After all,

> [c]ounsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both [the guilt and penalty] phases of the case.

ABA Death Penalty Guideline 10.7, cmt. at 1021. For this reason also, counsel may not decline to investigate based on a belief that investigation would be futile or even based on a client's expressed desires. *See id.*

This Court also has held repeatedly that constitutional error may occur where counsel fails to thoroughly investigate a defendant's background in order to identify and develop mitigating factors for sentencing. *See, e.g.*, *Rompilla*, 545 U.S. at 385-86; *Wiggins*, 539 U.S. at 534-35; *Williams*, 529 U.S. at 393. "Mitigating evidence unrelated to

dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398. Thus, "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (emphasis in *Wiggins*) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989)). "[A]mong the topics counsel should consider presenting," depending on the facts in a given case, "are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* (emphasis in *Wiggins*) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6 (1989)). Where prior counsel failed to adequately investigate potential mitigation factors, habeas counsel's investigation may be time-consuming, but is imperative and potentially outcome-determinative.

The surpassing importance of the duty to investigate is demonstrated, crucially and unfortunately, by the fact that "inadequate investigation by defense attorneys . . . ha[s] contributed to wrongful convictions in both capital and non-capital cases." ABA Death Penalty Guideline 10.7, cmt. at 1017. The duty to investigate is thus not unique to the capital context or to habeas proceedings. Counsel's professional obligations in the capital context stem from the broader obligation

of all criminal defense counsel "to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to" relevant facts. ABA Criminal Justice Standard 4-4.1(a).

Still, in a capital case, counsel's "duty to investigate the case thoroughly . . . is intensified (as are many duties) by the unique nature of the death penalty." ABA Death Penalty Guideline 10.7, cmt. at 1016. Moreover, in the capital context, even if guilt is determined correctly, inadequate investigation concerning the sentencing phase raises the risk that the death penalty will be imposed "in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). The disturbingly high rate of error as to both guilt and sentence demonstrates that "the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case" for a variety of reasons, including the possibility that "the trial attorney did not conduct an adequate investigation in the first instance." ABA Death Penalty Guideline 10.15.1, cmt. at 1086.

The importance of investigation in the federal habeas stage is also starkly illustrated by the numerous cases in which such investigation allowed counsel to develop claims that ultimately led to relief from a death sentence. This Court has vacated death sentences where investigation in federal habeas revealed a viable claim based on intellectual disability, *see Brumfield v. Cain*, 135 S. Ct. 2269, 2282-83 (2015), or on juror bias and prosecutorial misconduct, *see Williams*, 529 U.S. at 440 (2000). In both cases, *state* habeas courts had *denied* funding

for investigators to pursue the petitioner's claims. *See Brumfield*, 135 S. Ct. at 2275; *Williams*, 529 U.S. at 442.

The following additional examples are drawn from the experience of attorneys representing capital petitioners through the ABA's Death Penalty Representation Project:

- Joe Lee Guy: Mr. Guy was four months away from a scheduled execution date when lawyers at Dorsey & Whitney took over his case. The firm's new investigation revealed, among other things, that the investigator hired by Mr. Guy's previous defense counsel had befriended the victim's mother, coached her in her testimony against Mr. Guy, and became the sole beneficiary of her estate worth between $500,000 and $750,000. *See Guy v. Dretke*, No. CIV.A. 5:00-CV-191-C, 2004 WL 1462196, at *1 (N.D. Tex. June 29, 2004). The new investigation also discovered significant mitigation evidence that had not been presented previously, including the facts that Mr. Guy (a) had an IQ of 77, (b) suffered traumatic childhood abuse at the hands of his mother, (c) was abandoned as a child by both parents, and (d) had an alcoholic father who was murdered. *See* Howard Witt, *Death Row Inmate Wins Sympathy*, Chi. Trib., June 23, 2004. After an evidentiary hearing, the federal district court granted habeas relief based on ineffective assistance of counsel and remanded for a new penalty-phase trial. *See*

Guy, 2004 WL 1462196, at *2. Mr. Guy ultimately received a life sentence.

- Alberto Martinez Carreon: After state post-conviction relief was summarily denied, Manatt Phelps & Phillips took over the case. The firm conducted a full investigation with the help of several experts and investigators, some of whom traveled to Mexico where Mr. Carreon was born. *See* Pet. for Review of Denial of PCR at 51, *Arizona v. Carreon*, 2016 WL 1603009 (Mar. 14, 2016) (pending). The investigation discovered substantial mitigation evidence never presented to the jury about Carreon's abusive, impoverished childhood in Tijuana. *See id.* Among other things, a relative who came to rescue Carreon as a child from one of his parents' violent fights reported that she had found him so malnourished that he was on the verge of death and unable even to raise his head or arms. *See id.* at 64. The case is pending.

- Quintez Wren Hodges: Skadden, Arps, Slate, Meagher & Flom took over Mr. Hodges's case in 2006 and conducted a full investigation of several claims not previously investigated. The federal district court vacated Mr. Hodges's death sentence on multiple grounds, finding that he was entitled to relief based on his showings that (a) the prosecution knowingly presented false testimony during the sentencing phase of the trial, (b) the jury was improperly instructed at sentencing, and (c) Mr. Hodges was prejudiced at sentencing

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> by the ineffective assistance of his counsel, who was suffering a mental breakdown at the time and conducted no investigation. *Hodges v. Epps*, No. 1:07CV66-MPM, 2010 WL 3655851, at *38-39 (N.D. Miss. Sept. 13, 2010), *aff'd*, 648 F.3d 283 (5th Cir. 2011).

Were it not for the fact that they were represented by pro bono counsel that had the resources to investigate to develop their claims, Mr. Guy, Mr. Carreon, and Mr. Hodges would likely be dead or on death row today. But as Congress recognized, the system of justice in capital cases must not, and cannot, depend on the availability of pro bono services from law firms and lawyers willing and able to undertake an extensive financial commitment to ensure adequate investigation.[5]

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[5] As a practical matter, at any time, the number of attorneys able to undertake a capital habeas representation – including the required investigation – on a pro bono basis is limited. Notably, more than 80 percent of private attorneys are solo practitioners or practice in firms with 100 or fewer attorneys. Am. Bar Ass'n, Lawyer Demographics – Year 2016, http://goo.gl/CRsjXL. Because small and medium-sized firms often have higher staffing utilization levels and lower profit margins than large firms, it is more difficult for them to make an extensive, open-ended commitment – like that required by a capital habeas representation – without assurance of adequate compensation for their time and funding for reasonably necessary services. *See* ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers*, 5 (Mar. 2013). In the ABA's efforts to recruit pro bono counsel for capital cases, we have noted that inadequate funding for expert and investigative members of the defense team is a substantial deterrent to

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These examples illustrate the devastating human cost, and cost to the legitimacy of our justice system, when investigations in capital habeas are frustrated.

II. INVESTIGATION OFTEN REQUIRES SPECIALIZED SERVICES FOR WHICH INDIGENT PETITIONERS LACK FUNDS

The investigation required at the federal habeas stage often requires specialized services such as investigators, mitigation specialists, and mental health experts, especially when attorneys in prior stages failed to develop the facts relevant to potentially promising claims. This Court has recognized the need for these services, and Congress has provided funding to ensure access to these services for indigent petitioners. Professional guidelines make clear that, without funding for reasonably necessary services, it may become difficult or impossible for habeas counsel to fulfill their investigative obligations.

To ensure that access to habeas counsel is a meaningful safeguard for due process – and that post-conviction proceedings in capital cases meaningfully examine the constitutionality of trials and appeals – defense counsel must have not only the requisite skills and experience but also the time and resources necessary to provide quality representation. *Cf. Trevino*, 133 S. Ct. at 1921 (counsel must have adequate time and resources to

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attorneys and firms deciding whether they are able to represent an indigent capital client.

ensure a "meaningful opportunity" to develop and present a claim of ineffective assistance at trial). For this reason, and because ineffective-assistance claims in particular "often require investigative work," *Martinez*, 566 U.S. at 11-12, "[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified," *McFarland*, 512 U.S. at 855.

Ineffective assistance of counsel claims, by their nature, often are not obvious from a cold record, or even apparent from state habeas pleadings where state post-conviction counsel has failed to investigate. *See Trevino*, 133 S. Ct. at 1919; *Martinez*, 566 U.S. at 11-12. Failure of the federal courts to provide adequate funding for investigative services, including the services of mitigation specialists and mental health experts, "results in the inability to attract qualified counsel to take on capital cases and, where adequate counsel might be found, the inability of that counsel to conduct the necessary and thorough investigation of both guilt and penalty phase issues required at every stage of a capital case." Emily M. Olson-Gault, Testimony, *Birmingham, Alabama Hearing Before the Judicial Conference of the United States Committee to Review the Criminal Justice Act Program*, 3 (Feb. 18, 2016) (footnote omitted).

As the Court also has recognized, Congress enacted Section 3599 to provide "enhanced rights of representation" for defendants and petitioners in capital cases, including "more money for

investigative and expert services." *Martel v. Clair*, 565 U.S. 648, 659 (2012) (citing 18 U.S.C. § 3599(f)). Congress has done so "in light of what it calls 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" *Id.* (quoting 18 U.S.C. § 3599(d)). The enactment of Section 3599 "reflects a determination that quality legal representation is necessary" in capital proceedings to ensure "fundamental fairness in the imposition of the death penalty." *McFarland*, 512 U.S. at 855, 859. Crucially, Congress knew that such legal representation would in many cases require "investigative, expert, or other services," and so provided for defense counsel's ability to obtain funding for such services where "reasonably necessary for the representation." 18 U.S.C. § 3599(f). Just as "Congress's provision of a right to counsel" under the statute "reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings," the fact that the same statute provides for "'the defendant's attorneys to obtain such services' from the court," *McFarland*, 512 U.S. at 855, reflects Congress's determination that quality legal representation in some cases necessarily entails such services. The Court can "safely assume that [Congress] did not intend for the express requirement of counsel to be defeated," *id.* at 856, by interposing a restrictive rule that would deny services "reasonably necessary for the representation of the defendant," 18 U.S.C. § 3599(f).

This commonsense interpretation of the statute is confirmed by the history of Section 3599(f). When Congress initially enacted this statutory provision in 1988, there was substantial concern that identifying

counsel willing and able to represent death-row prisoners in federal habeas proceedings was becoming increasingly difficult. *See* 134 Cong. Rec. H7285 (daily ed. Sep. 8, 1988) (Statement of Rep. Conyers). When the provision was amended as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress was acutely aware of the fact that funding for specialized services to support investigation was needed at the habeas stage. *See, e.g.*, 141 Cong. Rec. S7819 (daily ed. June 7, 1995) (Statement of Sen. Biden) ("[T]he defendant needs the same tools available to him or her that a wealthy defendant would need or the prosecutor needs. . . . Do not be misled by the notion that the trial is over, therefore, there is no other factfinding to go on, you do not need an investigator."); *id.* at S7816-17 (Statement of Sen. Feingold) (noting "instances of States not providing sufficient resources to assigned defense counsel for proper investigation of a case" and the "significant disadvantage" at which such inadequate investigative resources puts capital defendants "[c]ompared to the resources available to an aggressive prosecutor"). Then-ABA President John J. Curtin, Jr., noted in his testimony that the Supreme Court's recent decision in *McCleskey v. Zant* had clarified "the intensive level of pre-filing investigation" that constitutes the due diligence standard for capital habeas attorneys. *Habeas Corpus Issues: Hearing Before the House of Representatives Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights*, 102nd Cong. 497-98 (July 17, 1991) (statement of John J. Curtin, Jr., ABA President).

"National standards on defense services have consistently recognized that quality representation *cannot be rendered unless* assigned counsel have access to adequate supporting services." ABA Death Penalty Guideline 4.1, cmt. at 955 (emphasis added) (internal quotation marks omitted). While the need for such services may arise in a variety of criminal defense contexts, it "is particularly acute in death penalty cases." *Id.* Where support services are reasonably necessary, these services should be provided by persons independent of the government and counsel should have the right to communicate with them confidentially "to the same extent as would counsel paying such persons from private funds." *Id.* Guideline 4.1(B)(2).

These services may be particularly important to a thorough investigation at the post-conviction stage. *See id.* Guideline 4.1, cmt. at 955. Investigators are often "indispensable to discovering and developing the facts that must be unearthed . . . in post-conviction proceedings," both because they have specialized expertise that counsel lacks and because counsel often simply has too many other duties to discharge. *Id.* at 954. Likewise, mitigation specialists "possess clinical and information-gathering skills and training that most lawyers simply do not have," and the time and ability to gather and incorporate what may be critical information for the defense case. *Id.* at 959; *see also* ABA Death Penalty Guideline 10.1 (capital habeas representation "requires enormous amounts of time, energy, and knowledge," and counsel ordinarily cannot be expected to shoulder that burden alone). Additionally, "[t]he circumstances of a particular

case will often require specialized research and expert consultation." *Id.* Guideline 10.7, cmt. at 1026. For example, where, as here, the petitioner "is a relatively recent immigrant, counsel must learn about," *inter alia*, "the circumstances of his upbringing in his country of origin." *Id.*

"In particular," given the prevalence of mental impairments and severely traumatic backgrounds among those convicted of capital crimes, "mental health experts are essential to defending capital cases." *Id.* Guideline 4.1, cmt. at 956. "Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during [capital] proceedings," and "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase." *Id.*; *see, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (reversing denial of habeas relief where counsel failed to investigate and present evidence related to, *inter alia*, defendant's "mental health or mental impairment"). Empirical research confirms that mental health evidence, if competently documented and credibly presented, frequently (and appropriately) "is considered by jurors to be highly mitigating." John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035, 1039 (2008). Thus, where mental health is at issue, "a psychologist or other mental health expert may well be a needed member of the defense team" or at least a mental health evaluation may be needed. ABA Death Penalty Guideline 10.4, cmt. at 1004; *see also id.* Guideline

4.1, cmt. at 956 ("Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.").

Thus, depending on the circumstances of a given case, whether an investigation is as thorough as *Wiggins* requires may depend upon counsel's ability to access reasonably necessary support services. *See* ABA Death Penalty Guideline 4.1(B). Indeed, in *Wiggins* it was a licensed social worker who uncovered "powerful" mitigating evidence regarding "petitioner's bleak life history" that this Court found might have changed the sentencing decision if only it had been presented to the jury. *Wiggins*, 539 U.S. at 516, 534. Commenters suggest that the need for specialized services has only grown in more recent years. *See, e.g.*, Hannah Jacobs Wiseman, *Pro Bono Publico: The Growing Need for Expert Aid*, 60 S.C. L. Rev. 493, 495 (2008) ("Increasingly, experts are necessities in legal cases, and low income individuals without access to quality expert testimony are at a strong disadvantage."); Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 Okla. City U. L. Rev. 23, 119 (2005) ("In the end, given the enormity of mitigation investigations and what is at stake, capital defense attorneys and public defender death penalty units need to increasingly rely on their colleagues in the mental health and social work communities to effectively represent capital defendants during the penalty phase.").

The ABA Death Penalty Representation Project has found that "[w]hen counsel fails to provide effective representation, it is often due to limitations such as fee caps and the *failure to fully fund expert and investigative members* of the defense team." Emily M. Olson-Gault, Testimony, *Birmingham, Alabama Hearing Before the Judicial Conference of the United States Committee to Review the Criminal Justice Act Program*, 3 (Feb. 18, 2016) (emphasis added). In light of Congress's provision for funding of reasonably necessary services and this Court's recognition of the importance of such services in federal habeas, there is no reason habeas counsel should be put at risk of having to violate professional norms by forgoing the assistance of mitigation specialists, investigators, or mental health experts whose services are reasonably necessary to a representation.

III. THE FIFTH CIRCUIT'S "SUBSTANTIAL NEED" TEST BLOCKS ESSENTIAL FUNDING AND PREVENTS COUNSEL FROM MEETING THEIR ETHICAL OBLIGATIONS

The Fifth Circuit's "substantial need" rule effectively denies counsel necessary resources to conduct the investigation that is needed to meet minimum professional standards for effective representation. In failing to appreciate the importance of investigation to litigation strategy and the development of claims, it frustrates and even blocks such factual development. Investigation is essential to capital prisoners receiving full and fair consideration of the constitutionality of their convictions and death sentences. Counsel taking on

the extensive burden of a capital habeas representation should be able to do so secure in the knowledge that they will be able to meet their professional duties as attorneys.

The Fifth Circuit interprets the language "reasonably necessary" in 18 U.S.C. § 3599(f) to require that the petitioner demonstrate a "'substantial need' for such services to pursue a claim." *Ayestas v. Stephens*, 817 F.3d 888, 896 (5th Cir. 2016). Not only does the "substantial need" rule appear on its face to interpose a higher standard than the statute requires, but as interpreted by the Fifth Circuit it effectively constitutes a preliminary determination of the merits of the claim that the services are sought to support. *See id.* at 896 (to obtain funds under § 3599(f) "[t]here must be a viable constitutional claim, not a meritless one"); *id.* at 898 (rejecting funding "because Ayestas cannot show that his claim is viable"). Requiring counsel to prove the merits of a claim without funding, in order to obtain funding to investigate the merits of that claim, is circular. It is also self-evidently unfair and impracticable, and it impermissibly jeopardizes the availability of funds that Congress has authorized for the performance of investigative functions that this Court recognizes are essential.

The decision in this case presents a striking example of the Fifth Circuit's paradoxical reasoning. Mr. Ayestas argued below, relying on *Martinez* and *Trevino*, that to prove his prior lawyers were ineffective "he must be allowed to develop and discover what his prior lawyers should have developed or discovered." *Id.* at 895. In short, Mr.

Ayestas did what other prisoners bringing ineffective-assistance claims based on inadequate investigation have done after *Martinez*: he pleaded and briefed that claim without having factually developed all aspects of it – especially the prejudice showing, which necessarily requires an understanding of what an adequate investigation would have uncovered – then moved under 18 U.S.C. § 3599(f) for the resources he needed, including a specific, detailed 20-page investigative plan created by an experienced mitigation specialist. Petitioners who fail to bring such claims in a timely manner risk waiving them. *See, e.g.*, *In re Paredes*, 587 F. App"x 805, 824-26 (5th Cir. 2014) (affirming denial of relief and denying stay of execution where Rule 60(b) motion based on *Martinez* and *Trevino* was not timely filed); *Fowler v. Joyner*, 753 F.3d 446, 466 (4th Cir. 2014) ("[E]ven if such *Martinez*-based claims existed, they have been waived by [petitioner's] failure to raise the issue below . . . ."). Mr. Ayestas's briefing identified several critical areas of further investigation that were needed, but of course could not identify more specifically how prior counsel's failure to pursue those investigations would have changed the picture at sentencing until the facts were developed through a thorough investigation during federal proceedings utilizing the necessary specialists.

The Fifth Circuit acknowledged that Mr. Ayestas "indeed offered" a "substantiated argument, not speculation, about what [his] prior counsel did or omitted doing." *Ayestas*, 817 F.3d at 896. The court's determination nevertheless that a mitigation specialist was not reasonably necessary, even to

support a "substantiated argument," because the petitioner could not show that his claim ultimately was "viable" and not "meritless" precludes development of the claim by prejudging its merits. In particular, the denial of funding for a mental health evaluation precludes the development of evidence to show the impact of Mr. Ayestas's since-diagnosed schizophrenia on his mental state at the time of the crime. *See id.* at 897-98. The Fifth Circuit ultimately recognized that Mr. Ayestas had not in fact been examined by a psychologist – correcting an erroneous finding on which the original panel opinion appeared to rely significantly, *id.* at 897 – and reiterated its decision only as to prejudice. *Ayestas v. Stephens*, 826 F.3d 214, 215 (5th Cir. 2016); *see also Ayestas*, 817 F.3d at 896 (interpreting the district court's ruling "as being that any evidence of ineffectiveness, even if found, would not support relief"). Thus, even where the Fifth Circuit acknowledges – or at least does not rule out the possibility – that the record from state proceedings is infected with prior counsel's ineffectiveness, a petitioner may not access the funds authorized by § 3599(f) unless he can prove *based on that infected record* that he was prejudiced by not having his claim investigated.[6]

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[6] In Texas, as in numerous other states, the state habeas process frequently allows for only a stunted investigation, partly due to strict deadlines. AM. BAR ASS'N, TEXAS DEATH PENALTY ASSESSMENT REPORT at xiii. As the ABA's state assessment team found in its research, "due to ineffective trial, appellate, and state habeas counsel, many inmates with claims of constitutional magnitude may be executed without a court

(cont'd)

As at least one district court in the Fifth Circuit has recently acknowledged, the Circuit's rule forces petitioners to "face[] something of a 'catch 22' in having to demonstrate that there is some relevant evidence he could discover without first having the funding to pursue that evidence.'" Order at 4, *Tong v. Stephens*, No. 4:10-cv-2355 (S.D. Tex. Sept. 22, 2014). By virtually guaranteeing the denial of necessary resources to perform one of capital habeas counsel's primary functions – investigation – the Fifth Circuit's approach not only deprives capital habeas petitioners of reasonably necessary services under 18 U.S.C. § 3599(f), but also effectively deprives them of their statutorily guaranteed right to counsel. In so doing, the Fifth Circuit's standard threatens to defeat this Court's jurisprudence and Congress's intent:

> Title 18 U.S.C. § 3599 entitles indigent defendants to the appointment of counsel in capital cases, including habeas corpus proceedings. By providing indigent capital defendants with a ***mandatory right to qualified legal counsel*** in these proceedings, Congress has recognized that federal

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ever reviewing their case on the merits." *Id.* at xii. The Fifth Circuit's restrictive standard for authorizing funding for reasonably necessary support services thus compounds an already fraught state process and raises a serious risk that an inmate may be executed without ever having effective assistance in presenting a claim of actual innocence or mitigation.

> habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.

Christeson v. Roper, 135 S. Ct. 891, 893 (2015) (emphasis added) (internal quotation marks omitted); *see also Trevino*, 133 S. Ct. at 1916-17 (2013) (recognizing "the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law").

The Fifth Circuit's approach prevents counsel from discharging their ethical responsibilities, frustrates statutory guarantees of representation, and jeopardizes due process. If the decision below is allowed to stand, the "substantial need" test will threaten to make *Martinez* and *Trevino* a dead letter for indigent petitioners. Counsel will rarely if ever be able to show more than a "substantiated argument" regarding both deficient performance and prejudice before obtaining funds necessary to develop the claims. Consequently, counsel will not be able to discharge their professional obligations in federal habeas representation, and the statutory guarantees of 18 U.S.C. § 3599(f) will effectively be unavailable.

Such an outcome threatens more than attorneys' ability to act consistent with professional standards. It threatens also the integrity, fairness, and reliability of the habeas process, of capital sentences, and ultimately of our criminal justice system.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association respectfully urges this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

CARLOS MANUEL AYESTAS,
Petitioner,

v.

LORIE DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, CONNECTICUT, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NEVADA, SOUTH CAROLINA, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

A. If the Fifth Circuit's Denial of Funding Is an Appealable Decision, This Court Should Affirm Based on 28 U.S.C. § 2254(e)(2) 6

B. The Dignity and Finality of State Criminal Proceedings Demands that *Martinez* Not Become a Trap Door for Escaping AEDPA's Ban on New Evidence 9

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) 8

City of Milwaukee v. Illinois & Michigan,
451 U.S. 304 (1981) 13

Coleman v. Thompson,
501 U.S. 722 (1991) 8

Cullen v. Pinholster,
563 U.S. 170 (2011) 2, 3, 6, 8

Davila v. Davis,
137 S. Ct. 2058 (2017) 10

Detrich v. Ryan,
740 F.3d 1237 (9th Cir. 2013) 12

Dickens v. Ryan,
740 F.3d 1302 (9th Cir. 2014) 2, 12, 13

Gregg v. Raemisch,
No. 16-cv-00173-CMA
(D. Colo. Dec. 19, 2016) 2, 11, 12

Holland v. Jackson,
542 U.S. 649 (2004) 6, 7

Jones v. Ryan,
No. 07-99000, 2017 WL 264500
(D. Ariz. Jan. 20, 2017) 2, 12

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 12

Martinez v. Ryan,
566 U.S. 1 (2012) ..... *passim*

Montgomery v. Louisiana,
136 S. Ct. 718 (2016) 9

POM Wonderful LLC v. Coca-Cola Co.,
134 S. Ct. 2228 (2014) 7

Strickland v. Washington,
466 U.S. 688 (1984) 10

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 13

Trevino v. Thaler,
133 S. Ct. 1911 (2013) 5

Wiggins v. Smith,
539 U.S. 510 (2003) 5, 8

Williams v. Taylor,
529 U.S. 420 (2000) 7, 12, 13

STATUTES

18 U.S.C. § 3599(f) ..... *passim*

28 U.S.C. § 2254, *et seq*. ..... *passim*

28 U.S.C. § 2254(b)(1)(A) 12

28 U.S.C. § 2254(e)(2) ..... *passim*

28 U.S.C. § 2254(e)(2)(A) 4

28 U.S.C. § 2254(e)(2)(A)(i) 6

28 U.S.C. § 2254(e)(2)(A)(ii) 7

28 U.S.C. § 2254(e)(2)(B) 4, 7

OTHER AUTHORITY

Pub. L. 109-177 (Mar. 6, 2006) 8

INTEREST OF *AMICI CURIAE*

The *amici* States have a compelling interest in the administration of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254, *et seq*. ("AEDPA"), which is designed in part to reduce the lengthy federal delay that too often occurs in capital cases.

The current case arises from Petitioner's attempt to raise a procedurally defaulted federal habeas claim based on ineffective assistance of trial counsel. Petitioner attempts to raise this claim pursuant to *Martinez v. Ryan*, 566 U.S. 1, 13-16 (2012), which excuses a habeas petitioner's procedural default of a "substantial" claim of ineffective assistance of trial counsel if the petitioner can demonstrate that state collateral- review counsel was ineffective for failing to raise that claim.

In particular, Petitioner requested funding pursuant to 18 U.S.C. § 3599(f) to investigate mitigation evidence that trial counsel elected not to pursue. The Fifth Circuit found that Petitioner's "gateway claim" of ineffective assistance by collateral-review counsel, as well as his underlying claim for ineffective assistance by trial counsel, were not meritorious, and denied his funding request on that basis.

Although the Fifth Circuit correctly assessed the merits, the court should have considered Petitioner's request in light of AEDPA and denied it for a much simpler reason: 28 U.S.C. § 2254(e)(2) bars the introduction of the evidence Petitioner sought to develop. Section 2254(e)(2) prohibits federal courts from considering evidence not previously presented in

state court. *See Cullen v. Pinholster*, 563 U.S. 170, 186 (2011). Because funding is available only for expenses "*reasonably necessary* for the representation of the defendant," 18 U.S.C. § 3599(f) (emphasis added), it is never available for new evidence that is precluded by Section 2254(e)(2). The cost of developing inadmissible evidence to support a defaulted claim cannot be "reasonably necessary."

While the logic of this argument is straightforward, its importance for the States lies in recognizing that Section 2254(e)(2) applies when a petitioner relies on *Martinez* to excuse the procedural default of claims alleging ineffective assistance at trial. The State of Arizona, for example, has faced 17 *Martinez* remands from the Ninth Circuit to reconsider ineffective-assistance claims previously dismissed on procedural grounds. In each of these cases, Section 2254(e)(2) should be a straightforward tool for limiting new evidence and avoiding a fact-bound struggle with the merits of a petitioner's underlying claim. But it is not. The Ninth Circuit has held that Section 2254(e)(2) does not apply to hearings inquiring into post-conviction counsel's ineffectiveness under *Martinez*, *Dickens v. Ryan*, 740 F.3d 1302, 1321–22 (9th Cir. 2014) (en banc), and at least two district courts have concluded that, if *Martinez* applies, Section 2254(e)(2) does not bar considering new evidence to resolve the ineffectiveness claim on the merits, *Jones v. Ryan*, No. 07-99000, 2017 WL 264500 (D. Ariz. Jan. 20, 2017); *Gregg v. Raemisch*, No. 16-cv-00173-CMA (D. Colo. Dec. 19, 2016).

Allowing the introduction of new evidence to assess an ineffectiveness claim brought under *Martinez*, along with possible funding to develop that evidence, will

frustrate the States' interest in finality and victims' interest in the just administration of the law, especially in light of the already inordinate delay in capital cases. Moreover, allowing the admission of new evidence to support these claims will increase the cost of litigating capital cases, putting additional strain on limited state resources.

This case provides an ideal vehicle for applying Section 2254(e)(2)'s new-evidence bar to cases governed by *Martinez*. In the process, this Court will also prohibit a misuse of Section 3599(f)'s funding provision.[1]

SUMMARY OF ARGUMENT

AEDPA provides that if a habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings, the [district court] shall not hold an evidentiary hearing on the claim." 28 U.S.C. § 2254(e)(2). Most importantly for Petitioner's case, Section 2254(e)(2) also prohibits the introduction of new evidence to resolve such claims. *See Pinholster*, 563 U.S. at 186. Thus, under AEDPA, questions regarding petitioners' ability to present new evidence—whether connected to guilt or sentencing—must first contend with Section 2254(e)(2).

Nothing in *Martinez* exempts petitioners from Section 2254(e)(2). Nor does that case establish a constitutional right to effective counsel in state collateral-review proceedings. As a result, a federal

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[1] Although this Brief focuses on 28 U.S.C. § 2254(e)(2), the *amici* States also support the jurisdictional argument presented in Part I of Respondent's merits brief.

court cannot consider new evidence regarding the failure of state collateral-review counsel to develop a petitioner's claim in state court unless the petitioner meets the exceptions contained in the provision itself. 28 U.S.C. § 2254(e)(2)(A),(B).

Here, although the Fifth Circuit correctly denied Petitioner's funding request under 18 U.S.C. § 3599(f) because his claims lacked merit, it should have first addressed the limitations imposed in 28 U.S.C. § 2254(e)(2). If evidence complies with the latter provision, meaning that it was presented in state court, then additional funding is likely unnecessary under Section 3599(f). Conversely, it cannot be "reasonably necessary" to expend resources developing evidence that was not presented in state court and therefore cannot be considered under AEDPA. Because the interaction between these two statutory provisions obviates any need to consider the merits of a petitioner's claims, the Fifth Circuit should have denied Petitioner's funding request on that basis, rather than delving into the merits. If this Court decides that the Fifth Circuit's denial of funding is an appealable decision, the Court should affirm that decision based upon Section 2254(e)(2).

The practical importance of applying Section 2254(e)(2) when a petitioner invokes *Martinez* to excuse a defaulted ineffective-assistance-of-trial-counsel claim extends beyond the question of funding. In Arizona, for example, 17 capital cases are pending in district court on remand from the Ninth Circuit to reconsider procedurally defaulted ineffectiveness claims in light of *Martinez*. Hearings have been ordered in two of these cases and requested in nearly all of the others. The

delay in adjudicating capital cases in the federal system is already inordinate. Allowing the admission of new evidence in these cases will not only cause additional delay by lengthening the briefing period, but it will also unduly lengthen and complicate the hearing process in cases for which a hearing is granted.

ARGUMENT

Petitioner filed a petition for writ of habeas corpus asserting that his trial counsel was ineffective under *Wiggins v. Smith*, 539 U.S. 510 (2003), for failing to investigate and present certain mitigating evidence. Because he did not raise this claim in state court, he is attempting to rely upon the equitable exception to the procedural default doctrine created by *Martinez* and expanded in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

In furtherance of his claim, Petitioner sought funding for an investigation under 18 U.S.C. § 3599(f). Section 3599(f) allows the court to provide funding "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence . . . ." *Id.*

The Fifth Circuit concluded that Petitioner's *Martinez* gateway claim (ineffective assistance of state collateral-review counsel), as well as his underlying *Wiggins* claim, were not meritorious. The court denied his funding request on that basis. In doing so, the Fifth Circuit ignored AEDPA and made the issue more complicated than it needed to be. Instead, the Fifth Circuit should have applied the limitation on evidentiary development in 28 U.S.C. § 2254(e)(2). This oversight is significant because the latter

provision averts the need to consider a claim's merits. Instead, it provides a clear rule that avoids lengthy dispute and inevitable appeal.

One of AEDPA's core purposes is to avoid delays in capital cases. Applying Section 2254(e)(2)'s ban on new evidence to claims invoking *Martinez* is consistent with that purpose and will save the States significant resources in fighting over the merits of every gateway claim for which a petitioner seeks investigative funding.

A. If the Fifth Circuit's Denial of Funding Is an Appealable Decision, This Court Should Affirm Based on 28 U.S.C. § 2254(e)(2).

AEDPA limits a petitioner's ability to obtain an evidentiary hearing in federal court on claims that were not raised in state court. If a habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings the [district court] shall not hold an evidentiary hearing on the claim." 28 U.S.C. § 2254(e)(2). The effect of this rule is to "restrict[] the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186; *see also Holland v. Jackson*, 542 U.S. 649, 653 (2004).

And the "restrict[ion]" is sweeping. AEDPA provides just two exceptions to the rule. The first is for claims that rely on "a new rule of constitutional law made retroactive to cases on collateral review, that was previously unavailable." 28 U.S.C. § 2254(e)(2)(A)(i). The second is for claims based on "a factual predicate that could not have been previously discovered through

the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). For either exception, "the facts underlying the claim" must be so compelling as to "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Neither of these exceptions applies here. Moreover, their express enumeration in the statute, preceded by the requirement that the district court "shall not" hold an evidentiary hearing "unless" one of the exceptions applies, militates against judicial development of new exceptions. *See, e.g., POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) (applying *expressio unius* canon).

Absent an exception, Section 2254(e)(2) holds petitioners responsible for the tactical decisions of their trial counsel. In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court interpreted the phrase "failed to develop" in Section 2254(e)(2) as imposing a duty of diligence on the petitioner: "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* at 435. Significant for the present case, *Williams* made no distinction between a petitioner's lack of diligence and that of his state collateral-review counsel. A claim is barred under Section 2254(e)(2) if courts find "a lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Id.* at 432 (emphasis added); *see also Holland*, 542 U.S. at 653 ("Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied.").

Martinez does not overturn, or even conflict with, precedent faithfully applying AEDPA's ban on new evidence. *Martinez* contains no exception to Section 2254(e)(2), nor did it establish a constitutional right to effective counsel in state collateral-review proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991). Thus, under AEDPA, if a post-conviction attorney fails to develop a petitioner's claim of ineffective state-court trial counsel, a federal court cannot "consider," *Pinholster*, 563 U.S. at 186, new evidence regarding that claim unless the petitioner qualifies for one of the statutory exceptions.

This bar on "consider[ing] new evidence," *id.*, must necessarily influence a court's approach to funding requests under 18 U.S.C. § 3599(f). If a petitioner is barred from presenting evidence in federal habeas proceedings, then the development of that evidence cannot be "reasonably necessary" for his representation. 18 U.S.C. § 3599(f). Moreover, AEDPA was already in place when Congress enacted the funding provision. *See* Pub. L. 109-177, § 222(a) (Mar. 6, 2006). This Court "assume[s] that our elected representatives . . . know the law" and intend for subsequent enactments to operate within the framework of existing law. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 697-98 (1979). The interaction between Sections 2254(e)(2) and 3599(f) should be the end of requests like the one at issue in this appeal.

The Fifth Circuit's alternative approach, with its focus on the merits of the underlying *Wiggins* claim, needlessly prolongs the issue and invites further appeals to this Court. Indeed, if this Court were to affirm the Fifth Circuit's merits-based approach, it

would signal that Section 2254(e)(2) is inapplicable to claims of ineffective assistance brought under *Martinez*. As discussed below, that implication would devour state resources and further prolong capital litigation in contravention of AEDPA's stated purpose.

If this Court finds that a denial of funding under 18 U.S.C. § 3599(f) is an appealable decision, it should affirm based upon AEDPA alone rather than upon the Fifth Circuit's merits-based approach.

B. The Dignity and Finality of State Criminal Proceedings Demands that *Martinez* Not Become a Trap Door for Escaping AEDPA's Ban on New Evidence.

Clarifying that *Martinez* does not exempt a procedurally defaulted ineffective-assistance claim from Section 2254(e)(2) serves the goals of federalism and respect for state judiciaries. States have a "weighty interest[] in ensuring the finality of [their] convictions and sentences." *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016). As this Court affirmed just last Term, federal habeas corpus jurisprudence raises special concerns regarding the sanctity of state-court proceedings:

> Federal habeas review of state convictions entails significant costs, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority. It frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. It degrades the prominence of the trial, and it disturbs the State's significant interest in repose for concluded litigation [and]

> denies society the right to punish some admitted offenders.

Davila v. Davis, 137 S. Ct. 2058, 2070 (2017) (internal citations and quotation marks omitted).

Since this Court decided *Martinez*, the question whether a habeas petitioner's state collateral-review counsel was ineffective under *Strickland v. Washington*, 466 U.S. 688 (1984)—in order to excuse the procedural default of a claim of ineffective assistance at trial—has become a central battleground in habeas corpus litigation. At the time of that decision, it was unclear what effect *Martinez* would have on the finality of state convictions. The dissenting justices predicted that "in *all* capital cases from this date on," persons facing capital sentences would raise ineffective-assistance claims, causing "the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system." *Martinez*, 566 U.S. at 23 (Scalia, J., dissenting).

So far, that prediction appears regrettably accurate. Amicus State of Arizona has seen 17 capital cases remanded by the Ninth Circuit pursuant to *Martinez*. Almost all of them involve decades-old convictions for homicides committed even longer ago. *See Detrich v. Ryan*, No. 08–99001 (Conviction Date: 11/02/90); *Doerr v. Ryan*, No. 09–99026 (Conviction Date: 04/15/96); *Gallegos v. Ryan*, No. 08–99029 (Conviction Date: 03/14/91); *Greene v. Ryan*, No. 10–99008 (Conviction Date: 03/15/96); *Hooper v. Ryan*, No. 08–99024 (Conviction Date: 12/24/82); *Jones (Danny) v. Ryan*, No. 07–99000 (Conviction Date: 01/11/07); *Jones (Barry) v.*

Ryan, No. 08–99033 (Conviction Date: 04/14/95); *Kayer v. Schriro*, No. 09–99027 (Conviction Date: 03/26/97); *Lee (Chad) v. Schriro*, No. 09–99002 (Conviction Dates: 03/24/94, 08/29/94); *Lee (Darrel) v. Ryan*, No. 10–99022 (Conviction Date: 11/17/92); *Martinez v. Ryan*, No. 08–99009 (Conviction Date: 09/26/97); *Reinhardt v. Ryan*, No. 10–99000 (Conviction Date: 02/22/96); *Salazar v. Ryan*, No. 08–99023 (Conviction Date: 12/14/87); *Schackart v. Ryan*, No. 09–99009 (Conviction Date: 03/16/85); *Smith v. Ryan*, No. 10–99002); *Spears v. Ryan*, No. 09–99025 (Conviction Date: 12/09/92); and *Walden v. Ryan*, No. 08–99012 (Conviction Date: 07/31/92).

Hearings are pending in two of these cases. A third case was also awaiting hearing, but, as if to illustrate the radical delay now built into capital litigation, the petitioner died before his *Martinez* hearing could occur. *Lopez v. Ryan*, No. 09–00928. His crime was committed in 1989.

Making matters even worse, lower courts have held that Section 2254(e)(2) *does not* bar new evidence, either to determine whether cause exists under *Martinez* or to resolve the merits of the defaulted trial-ineffectiveness claim. The District of Colorado, for example, recently held that "an applicant making a *Martinez* argument is not asserting a 'claim' for relief" and therefore need not comply with Section 2254(e)(2). *Gregg v. Raemisch*, No. 16-cv-00173-CMA, slip op. at 43-44 (D. Colo. Dec. 19, 2016). The District of Arizona similarly reasoned that "a petitioner who has shown 'cause' to excuse the failure to bring a claim in state court . . . has also by definition shown 'cause' to excuse the failure to develop that same claim within the

meaning of § 2254(e)(2)." *Jones*, 2017 WL 264500, at *19 (D. Ariz. Jan. 20, 2017).

Likewise, the Ninth Circuit has held that, where *Martinez* is involved, Section 2254(e)(2) does not limit the introduction of new evidence to resolve the question of post-conviction counsel's ineffectiveness (which necessarily involves consideration of the underlying trial-ineffectiveness claim) as a basis for finding cause to set aside a procedural default. *Dickens v. Ryan*, 740 F.3d 1302, 1321–22 (9th Cir. 2014) (en banc); *see also Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) (plurality). The *Dickens* court reasoned that because the question whether cause exists is an equitable inquiry, it therefore lies outside Section 2254(e)(2)'s ambit.

The reasoning in *Gregg*, *Jones*, *Dickens*, and *Detrich* is contrary to this Court's jurisprudence. *Jones*, for example, contradicts this Court's holding in *Williams* that, unlike AEDPA's exhaustion requirement in 28 U.S.C. § 2254(b)(1)(A), a petitioner cannot excuse his failure to develop claims in state court—*i.e.*, the requirement imposed by Section 2254(e)(2)—by proving cause and prejudice or a miscarriage of justice. *Williams*, 529 U.S. at 433. *Williams* explained that "in requiring that prisoners who have not been diligent satisfy § 2254(e)(2)'s provisions *rather than show cause and prejudice*, and in eliminating a freestanding "miscarriage of justice" exception, Congress raised the bar *Keeney* [*v. Tamayo-Reyes*, 504 U.S. 1 (1992)] imposed on prisoners who were not diligent in state-court proceedings." *Id.* (emphasis added). Thus, even accepting the *Jones* court's reasoning that a *Martinez*

petitioner has shown cause, that assumption is not enough to bypass Section 2254(e)(2).

The *Dickens* rationale fares no better. It would create an equitable exception capable of swallowing an entire statute. This proposal upsets not only the relationship between the state and federal governments but the constitutional balance between branches of the federal government as well. *See City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315 (1981) (this Court cannot "'judicially decree[] what accords with 'common sense and the public weal' when Congress has addressed the problem") (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195 (1978)). Crafting an equitable exception that drains Section 2254(e)(2) of its force in the context of *Martinez* is a judicial usurpation of Congress's authority to make laws. It also runs contrary to the Court's longstanding principle that "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams*, 529 U.S. at 437.

The effect of *Martinez* is already onerous, and a failure to apply Section 2254(e)(2) will only compound the problem. In Arizona's experience, 17 *Martinez* remands have produced more than 60 claims for resolution by the district court. The delay since conviction in these cases ranges from 19 years to a staggering 34 years. If Section 2254(e)(2) does not apply and petitioners are allowed to develop and introduce new evidence in these cases, the delays will only increase and more petitioners will, as a practical matter, convert their capital sentences into lifelong incarcerations. Moreover, unless a capital habeas

petitioner is certain that he has a winning claim, the potential for a new phase of factual development is strong incentive to hold some claims in reserve for the sole purpose of delay.

Evidentiary proceedings in capital cases consume a tremendous amount of state resources, including expert-witness fees that far exceed the burden this Court envisioned in *Martinez* itself. That burden is front and center in the present case, which arises in connection with the funding provision in 18 U.S.C. § 3599(f). The resources currently consumed in responding to claims brought under *Martinez* will pale in comparison to the burden States will face if petitioners are eligible for government funding to develop their long-defaulted theories of ineffectiveness.

This Court should affirm AEDPA's applicability to *Martinez* gateway claims and head off the developing body of law that would reach the opposite conclusion at the cost of considerable delay.

CONCLUSION

This Court should affirm the Fifth Circuit's denial of Petitioner's funding request based upon 28 U.S.C. § 2254(e)(2)'s bar to the introduction of new evidence.

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CARLOS MANUEL AYESTAS,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE CAPITAL PUNISHMENT CENTER OF THE UNIVERSITY OF TEXAS AT AUSTIN SCHOOL OF LAW IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

THE FIFTH CIRCUIT'S INAPPROPRIATELY RESTRICTIVE APPROACH TO FUNDING APPLICATIONS UNDER 18 U.S.C. § 3599(F) RESTS ON TWO FUNDAMENTAL, RECURRING ERRORS IN ITS SIXTH AMENDMENT JURISPRUDENCE: ITS BELIEF THAT MITIGATION CANNOT AFFECT OUTCOMES IN HIGHLY AGGRAVATED CASES AND ITS ASSUMPTION THAT A CLIENT'S RELUCTANCE TO PURSUE PARTICULAR LINES OF INVESTIGATION RELIEVES TRIAL COUNSEL OF ALL PROFESSIONAL DUTIES REGARDING THE INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE 6

A. A "brutal crime" does not preclude a finding of prejudice arising from counsel's failure to conduct an adequate mitigation investigation 6

B. A client's initial hesitation about contacting certain family members does not excuse counsel from conducting a professionally adequate mitigation investigation 14

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Ayestas v. Stephens, No. 15-70015 (5th Cir. May 14, 2015) 13

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991) 20

Blystone v. Horn, 664 F.3d 397 (3d Cir. 2011) 18

Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988) 17

Carty v. Thaler, 583 F.3d 244 (5th Cir. 2009) 16

Clark v. Thaler, 673 F.3d 410 (5th Cir. 2012) 7

Galloway v. Thaler, 344 Fed. App'x 64 (5th Cir. 2009) 16

Gray v. Branker, 529 F.3d 220 (4th Cir. 2008) 19

Hamilton v. Ayers, 583 F.3d 1100 (9th Cir. 2009) 19

Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) 20

Ladd v. Cockrell, 311 F.3d 349 (5th Cir. 2002) 7, 8

Porter v. McCollum, 558 U.S. 30 (2009) 18

Rompilla v. Beard, 545 U.S. 374 (2005) 10, 11, 13, 19

Santellan v. Cockrell, 271 F.3d 190 (5th Cir. 2001) 7

Schriro v. Landrigan, 550 U.S. 465 (2007) 5, 17, 18, 19

Sears v. Upton, 561 U.S. 945 (2010) 11, 13

Strickland v. Washington, 466 U.S. 668 (1984) 8

Vasquez v. Thaler, 389 Fed. App'x 419 (5th Cir. 2010) 7

TABLE OF AUTHORITIES – Continued

Page

Wiggins v. Smith, 539 U.S. 510 (2003) 9, 10, 11, 13

Wiley v. Puckett, 969 F.2d 85 (5th Cir. 1992) 17

Williams v. Taylor, 529 U.S. 362 (2000) 8, 9, 11, 13

STATUTES, RULES, AND REGULATIONS

18 U.S.C. § 3599(f) 2, 4, 5, 6, 7

Tex. Code Crim. Proc. art. 37.071, § 2(e) 11

Tex. Code Crim. Proc. art. 37.071, § 2(g) 11

SECONDARY SOURCES

American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913 (2003) 20, 21

Noelle Phillips & Jordan Steffen, *Juror Says One Said No to Death*, Denver Post, Aug. 8, 2015 12

Tasha Tsiasperas, *Is the Death Penalty Dying in Dallas County?*, Dallas Morning News, June 3, 2017, *available at* 2017 WLNR 17158104 12

INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief is submitted by the Capital Punishment Center of the School of Law of the University of Texas at Austin ("the Center"). The Center was established in 2006 to promote research and training in death penalty law. The Center sponsors academic events, pursues research projects concerning the administration of the death penalty, particularly in Texas, and houses the Capital Punishment Clinic, which provides direct representation and assistance to indigent prisoners on Texas's death row. Faculty within the Center teach courses on capital punishment law, capital defense representation, and capital trial preparation.

The Center's concern in this case stems from its commitment to comprehensive mitigation investigation in capital cases. As this Court has noted numerous times, such investigation is critical to a fair assessment of appropriate punishment. Diligent investigation often uncovers facts crucial to gauging a defendant's moral culpability for his or her offense.

Unfortunately, capital trial lawyers in Texas too often have failed in their basic investigative obligations. In such cases, the jury is left to decide between

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for both parties have issued blanket consent to the filing of *amicus curiae* briefs in support of either party.

life and death on the basis of incomplete and inaccurate information. When state habeas counsel subsequently fails as well to uncover relevant mitigating evidence, the sole avenue for recourse is federal habeas corpus. This case will determine whether death-sentenced inmates who received inadequate representation throughout state court proceedings will be afforded a meaningful opportunity to litigate their ineffective assistance of counsel ("IAC") claims in federal court. If the bar to funding under 18 U.S.C. § 3599(f) is set too high, above the "reasonably necessary" standard set forth in the statute, many death-sentenced inmates will proceed to execution without any adequate mitigation investigation in their cases.

This brief will not focus directly on the question of funding under § 3599(f). Rather, the Center focuses on two features of the Fifth Circuit's IAC jurisprudence relied upon to deny funding in this case: the belief that mitigation cannot affect outcomes in highly aggravated cases and the assumption that a client's reluctance to pursue particular lines of investigation relieves trial counsel of all professional duties regarding the investigation and presentation of mitigating evidence. The first proposition – that mitigation cannot affect outcomes in highly aggravated cases – runs directly against this Court's decisions, professional norms, and the experience of capital litigators. Perhaps equally important, this position discourages lawyers from fulfilling their professional obligations whenever faced with an aggravated capital crime. The second proposition – that capital trial lawyers should cut

short their mitigation investigation whenever a client expresses concerns about contacting particular witnesses – is likewise contrary to long-recognized professional norms and this Court's Sixth Amendment jurisprudence. Capital trial lawyers must build strong relationships with their clients to earn their trust and facilitate robust mitigation investigation; when clients resist particular lines of mitigation inquiry, as they often do, lawyers are still obligated to undertake comprehensive mitigation efforts. Such efforts are required not simply to protect their clients; uncovering and presenting mitigating evidence protects the community interest by avoiding the imposition of a death sentence contrary to prevailing community values.

Perhaps the two most important and distinctive features of the modern American death penalty are the creation of a separate phase in capital trials to assess punishment (bifurcation) and the recognition of a robust right to individualized sentencing. These complementary features of contemporary capital schemes ensure that jurors are able to make nuanced, contextual judgments about whether a particular defendant deserves to live or die. For our system to work, capital trial lawyers must take seriously their obligations to develop a mitigation case. The Center's commitment to educating students and training lawyers about this critical function motivates its participation in this case.

SUMMARY OF ARGUMENT

In its decision upholding the denial of funding under § 3599(f), the Fifth Circuit concluded that potential evidence of Petitioner's mental illness and history of drug dependence was "not substantially likely" to have affected the outcome of his trial in light of the "brutality of the crime." This conclusion is astonishing in as much as the evidence has not yet been discovered or presented (hence the request for funding). The Fifth Circuit did not make a judgment that *particular* mitigation evidence it reviewed was insufficient to overcome the aggravating aspects of the offense; it asserted that *any* evidence subsequently discovered would be insufficient – whatever it might be.

The Fifth Circuit's conclusion rests on a longstanding fallacy in its approach to IAC claims: that mitigation simply does not matter in cases it characterizes as "brutal" or highly aggravated. This Court's decisions have explicitly and implicitly rejected the Fifth Circuit's position in numerous cases, finding prejudice where trial counsel failed to uncover powerful mitigating evidence, notwithstanding the presence of significant aggravation. These decisions make clear that the question of prejudice should focus primarily on the nature and significance of the *mitigating* evidence trial counsel failed to uncover and present. Such an approach is consistent with professional norms and practical experience. Lawyers are duty-bound to pursue mitigation strategies notwithstanding significant aggravation, and trial practice confirms that mitigation investigation can yield fruit by preventing the

imposition of death even in challenging cases. For this reason, it is inappropriate for federal courts to deny funding under § 3599(f) by forecasting insufficient prejudice, because such courts are invariably in a poor position to make that assessment.

In its initial decision, the Fifth Circuit endorsed the district court's view that trial counsel could not be deemed ineffective because Petitioner was initially reluctant to have counsel contact his relatives. The Fifth Circuit rejected the idea that counsel must pursue other avenues for mitigation in such circumstances, consistent with the Fifth Circuit's general approach excusing counsel from mitigation investigation whenever a client is unhelpful to the investigation. The Fifth Circuit's decisions go well beyond this Court's holding in *Schriro v. Landrigan*, 550 U.S. 465, 477 (2007), which rejected an IAC claim where the defendant adamantly and on the record "refused to allow the presentation of any mitigating evidence." This Court's decisions confirm that trial counsel must pursue reasonable lines of mitigation investigation even if a client is unhelpful or uncooperative in some respects.

Ultimately, the Fifth Circuit modified its original opinion because it was predicated on the mistaken assertion that counsel had procured a psychological examination of Petitioner prior to trial. Its revised opinion does not rely on the absence of deficient performance, but solely on its view regarding the lack of prejudice. Nonetheless, the argument that counsel could not be deemed deficient because Petitioner was

initially reluctant about contacting his relatives misstates the operative law and undercuts the professional responsibilities of capital trial attorneys. To the extent the district court relied on Petitioner's reluctance to contact family members to excuse trial counsel's unprofessional investigation, the district court was in error.

ARGUMENT

THE FIFTH CIRCUIT'S INAPPROPRIATELY RESTRICTIVE APPROACH TO FUNDING APPLICATIONS UNDER 18 U.S.C. § 3599(F) RESTS ON TWO FUNDAMENTAL, RECURRING ERRORS IN ITS SIXTH AMENDMENT JURISPRUDENCE: ITS BELIEF THAT MITIGATION CANNOT AFFECT OUTCOMES IN HIGHLY AGGRAVATED CASES AND ITS ASSUMPTION THAT A CLIENT'S RELUCTANCE TO PURSUE PARTICULAR LINES OF INVESTIGATION RELIEVES TRIAL COUNSEL OF ALL PROFESSIONAL DUTIES REGARDING THE INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE.

A. A "brutal crime" does not preclude a finding of prejudice arising from counsel's failure to conduct an adequate mitigation investigation.

The panel opinion upholding the denial of funds essentially creates a "brutal crime" exception to funding under § 3599(f). Under the Fifth Circuit's approach, if a crime is sufficiently aggravated, funding can be withheld because any mitigation investigation would be superfluous: the aggravation of the crime is

sufficient to deny relief on the underlying IAC claim. Apart from its unsustainability as a reading of the "reasonably necessary" language in § 3599(f), this line of reasoning reveals a longstanding error in the Fifth Circuit's approach to IAC claims.

The Fifth Circuit consistently denies relief even in cases where trial counsel failed to uncover and present powerful mitigating evidence. *Santellan v. Cockrell*, 271 F.3d 190, 198 (5th Cir. 2001) (concluding, in light of the defendant's dangerousness and the "horrific nature" of the offense, that there was "no substantial likelihood that the outcome of the punishment phase would have been altered by evidence that [the defendant] suffered organic brain damage"); *Vasquez v. Thaler*, 389 Fed.App'x 419, 429 (5th Cir. 2010) (rejecting prejudice where trial counsel failed to develop and present evidence of post-traumatic stress disorder, fetal alcohol syndrome, and a borderline IQ given "overwhelming evidence of guilt" and the "brutality" of the offense); *Clark v. Thaler*, 673 F.3d 410, 421-25 (5th Cir. 2012) (stating that the aggravating evidence in the case was overwhelming, thus making it "virtually impossible to establish prejudice" under circuit case law, notwithstanding extensive evidence of childhood abuse and trauma) (internal quotation marks and citation omitted). The Fifth Circuit's opinion in *Ladd v. Cockrell*, 311 F.3d 349 (5th Cir. 2002), is representative of the court's insistence that significant mitigation is irrelevant in the context of a highly aggravated case. Ladd's trial attorney had failed to uncover and present evidence of Ladd's diagnosis of mental retardation as

a child as well as his "troubled childhood." *Id.* at 360. The Fifth Circuit acknowledged that trial counsel's performance might have been deficient (and that the state court's contrary conclusion might have been unreasonable). It nonetheless denied relief based on the absence of prejudice, asserting that when evidence of future dangerousness is "overwhelming," it is "virtually impossible to establish prejudice." *Id.* Though *Ladd* cited to this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), for that proposition, nothing in *Strickland* offers support. In *Strickland*, this Court carefully assessed the strength of the *mitigating* evidence to make a judgment about prejudice, finding that the "evidence that [Strickland] says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge." *Id.* at 699-700. In fact, in the context of that case, this Court noted that introduction of the purportedly mitigating evidence "might even have been harmful" to his cause. *Id.* at 700.

Subsequent decisions by this Court confirm that the prejudice inquiry for IAC claims must evaluate the strength and significance of the *mitigating* evidence trial counsel failed to discover, even in highly aggravated cases. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court found unreasonable the state court's assessment of prejudice. Williams had been sentenced to death for killing his victim with a mattock after the victim refused to lend him a couple of dollars. Williams

also had committed numerous other offenses, including violent assaults on elderly persons after the commission of his capital murder. *Id.* at 368 (noting that Williams had "brutally assaulted" an elderly woman leaving her in a "vegetative state"). Williams also had been convicted of setting a fire in jail while awaiting his capital trial. *Id.* Much like the approach in the Fifth Circuit, the Fourth Circuit had reversed a grant of relief on Williams' IAC claim in part because the evidence of Williams' future dangerousness was "simply overwhelming," *Id.* at 374. This Court, though acknowledging and detailing the extensive aggravation in Williams' case, held that an assessment of prejudice must take account of the *mitigating* evidence that should have been presented: "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398. Because the state court "did not entertain that possibility," that court "failed to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Id.*

Likewise, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court granted IAC relief in the context of a crime similar to the one presently before the Court: the victim, an elderly woman, was found drowned in the bathtub of her ransacked apartment. *Id.* at 514. After determining that trial counsel had conducted an unreasonable mitigation investigation, this Court turned to the question of prejudice, making clear that the

determination of prejudice must account for *both* evidence in aggravation and evidence in mitigation. *Id.* at 534 ("[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence"). Because the "mitigating evidence counsel failed to discover and present" was "powerful," this Court held "that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Id.* at 536. After all, in Wiggins' case, as in Texas, a death verdict requires unanimity; prejudice is thus established if "there is a reasonable probability that at least one juror [who] would have struck a different balance" in light of the undiscovered mitigating evidence. *Id.* at 537.

In *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court again granted IAC relief in the context of another highly aggravated crime, one in in which the defendant had repeatedly stabbed his victim and set him on fire, with the jury finding that "the murder was committed by torture." *Id.* at 378. Reversing the denial of petitioner's IAC claim, this Court determined that his trial attorneys were deficient in failing to examine a readily available file relating to a prior conviction, a file that yielded important mitigating evidence. Despite the aggravated nature of the offense, including the presence of torture, this Court found "beyond any doubt that counsel's lapse was prejudicial," *id.* at 390, because the mitigating evidence subsequently discovered "add[ed] up to a mitigation case that [bore] no relation to the few naked pleas for mercy actually put

before the jury." *Id.* at 393. Unlike the Fifth Circuit, which routinely holds that significant aggravation ends the inquiry, this Court stated exactly the opposite: "It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Rompilla's culpability." *Id.* (internal quotation marks and citations omitted); *accord Sears v. Upton*, 561 U.S. 945 (2010) (summarily reversing finding of no prejudice in case where defendant had kidnapped, raped and murdered his 59-year-old victim after punching her in the face with brass knuckles and handcuffing her in the backseat of a car).

Williams, Wiggins, Rompilla, and *Sears* abundantly demonstrate that an assessment of prejudice cannot be made without knowing the extent of the mitigating evidence that could have been found and introduced at the time of trial.[2] All of these cases involved brutal, senseless murders, and all are appropriately characterized as highly aggravated. Yet in each case, this Court never suggested that it is "virtually impossible" to establish prejudice because of the presence of significant aggravation; instead, in each case the Court

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[2] This is particularly true in Texas, where capital sentencing juries are not asked to weigh aggravating factors against mitigating circumstances. Instead, jurors respond to a "special issue" asking whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." Tex. Code Crim. Proc. art. 37.071, § 2(e). If one juror answers this question affirmatively, the defendant is sentenced to life. *Id.* § 2(g).

determined that the strength of the undiscovered mitigation was sufficient to find prejudice under the Sixth Amendment.

This Court's belief that mitigation evidence might well influence a jury's appraisal of a defendant's culpability, even in high aggravation cases, is vindicated by experience. The worst crimes do not invariably produce capital sentences, especially when trial lawyers provide persuasive evidence of reduced culpability. James Holmes, who killed twelve and injured seventy others in the Aurora theater massacre, was spared death after expert witnesses testified to his serious mental illness, offering diagnoses of schizotypal personality disorder and schizoaffective disorder. Even though the jury had rejected his insanity defense, it did not unanimously support a sentence of death, and Holmes was sentenced to life without possibility of parole. Noelle Phillips & Jordan Steffen, *Juror Says One Said No to Death*, Denver Post, Aug. 8, 2015, at A4. In a recent Dallas County, Texas case involving four murder victims and four severely injured children, the jury did not impose death after trial attorneys presented significant mitigating evidence regarding the defendant's mental illness, mismanagement of his medication at the time of the offense, and subsequent good behavior awaiting trial. Tasha Tsiasperas, *Is the Death Penalty Dying in Dallas County?*, Dallas Morning News, June 3, 2017, *available at* 2017 WLNR 17158104.

The Fifth Circuit's insistence that no amount of mitigation could overcome the aggravation in this case

is especially troublesome given the sparse record regarding the crime. On direct appeal, the Texas Court of Criminal Appeals ("CCA") acknowledged that the conviction rests "primarily on circumstantial evidence" and the record does not reveal whether Petitioner actually killed the victim. Joint Appendix ("JA") at 128. In sustaining Petitioner's conviction against a sufficiency challenge, the CCA concluded that adequate evidence established Petitioner's guilt under the "law of parties": a rational trier of fact could conclude "that appellant either murdered the victim or participated in the crime by promoting or assisting its commission." JA 129. The absence of a clear picture of Petitioner's participation in the offense – including whether he even caused or intended the victim's death – is a far cry from the kinds of aggravation in *Williams, Wiggins, Rompilla*, and *Sears* (intentional brutal assault of an elderly victim, intentional drowning of elderly victim, murder by torture, and murder accompanied by kidnapping and rape, respectively) that this Court deemed insufficient to preclude a finding of prejudice. Moreover, Petitioner's request for funding rests in part on evidence of his substantial mental health issues, including a diagnosis of schizophrenia following a psychotic episode, ROA 770-74;[3] JA 144-48, as well as evidence of substance abuse. Evidence of significant mental impairment is precisely the sort of evidence that "might well have influenced the jury's appraisal" of Petitioner's culpability. At the punishment phase,

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[3] "ROA" citations refer to the Record on Appeal in *Ayestas v. Stephens*, No. 15-70015 (5th Cir. May 14, 2015).

the state implicitly acknowledged as much when the prosecutor asked the jury in closing argument: "Does he have anything there that would lead you to conclude there is some type of mitigation, anything at all? There is no drug problem. There's no health problem. There is no alcohol problem." ROA 4747. Trial counsel's failure to uncover mitigating evidence was thus used to secure Petitioner's death sentence, and the Fifth Circuit's confidence that mitigation was unlikely to affect the outcome is belied by the prosecution's own presentation of its case.

B. A client's initial hesitation about contacting certain family members does not excuse counsel from conducting a professionally adequate mitigation investigation.

In its revised opinion, the panel relied wholly on its mistaken prejudice analysis in finding the merits of Petitioner's IAC claim not viable. JA 404. But both the district court and the panel in its initial opinion emphasized as well their view that Petitioner could not assert deficiency in trial counsel's mitigation investigation because Petitioner at one point "instructed counsel not to call" certain members of his family in Honduras. JA 364. Petitioner disputed trial counsel's claim that he instructed her not to contact those family members, JA 159, and there are reasons to be skeptical of trial counsel's account, given that she amended her

sworn testimony in light of its inconsistency with provable facts.[4] But even accepting trial counsel's account, despite Petitioner's initial reluctance to have certain members of his Honduran family contacted because of inter-family problems, he ultimately supported such contact. JA 162 (the defendant "stated that he did not want his family contacted due to problems he and his family had in his home country" but he acquiesced in such contact "before jury selection began"). Trial counsel never claimed that Petitioner interfered with the introduction of mitigating evidence or requested that such evidence be withheld; nor did Petitioner direct counsel not to contact *other* members of his family (who resided in the United States), whom trial counsel failed to contact as well. The record reveals virtually no investigation regarding mitigation until just before trial, with over a year of inactivity, despite the appointment of an investigator; the investigation that was undertaken consisted mostly of a few letters and phone calls, with no direct conversations with any member of Petitioner's family (or even any of his friends and acquaintances). The lack of contact was all the more unreasonable because trial counsel had learned from a questionnaire that Petitioner had experienced several head traumas and subsequent headaches, ROA 687-88, and had longstanding problems with drugs, including at the time of the offense. *Id.* Nonetheless, trial

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[4] In her original affidavit, trial counsel claimed that Petitioner did not approve her contacting his family until "after jury selection was completed," JA 154, but she was shown to have contacted the family more than two weeks before the start of jury selection. JA 162.

counsel's entire punishment phase mitigation presentation lasted about two minutes, with no live testimony and simply the introduction of letters addressing Petitioner's attentiveness in a prison English class. JA 47-49. The jury was left with essentially no information about Petitioner's background, impairments, or substance abuse, and the prosecution highlighted the absence of explanation for Petitioner's conduct as a reason to impose the death penalty.

On these facts, Petitioner's initial reluctance to have certain members of his family contacted could not excuse trial counsel's demonstrable failure to conduct a professional mitigation investigation. But the district court and the panel relied on Fifth Circuit case law that treats any resistance regarding mitigation investigation by a capital defendant as adequate grounds for rejecting an IAC claim. *Carty v. Thaler*, 583 F.3d 244, 263-66 (5th Cir. 2009) (holding that Carty's "obstreperousness" and "obfuscation" contributed to and therefore excused counsel's failure to learn that the defendant was a foreign national and to contact available witnesses in her home country); *Galloway v. Thaler*, 344 Fed. App'x 64 (5th Cir. 2009) (excusing counsel's failure to investigate and uncover evidence of childhood abuse because the defendant was hesitant to cast his father in a negative light). Indeed, the Fifth Circuit appears to take an extreme view, that a capital defendant bears the burden of directing the mitigation investigation, such that "a defendant who does not provide any indication to his attorneys of the availability

of mitigating evidence may not later assert an ineffective assistance claim." *Wiley v. Puckett*, 969 F.2d 85, 99-100 (5th Cir. 1992); *Byrne v. Butler*, 845 F.2d 501, 513 (5th Cir. 1988) (counsel was not ineffective for failing to uncover evidence of defendant's mental disorder because petitioner did not "intimate[] to his attorneys that he was suffering from a mental disorder").

The Fifth Circuit's approach finds no shelter in this Court's decision in *Schriro v. Landrigan*, 550 U.S. 465 (2007). In *Landrigan*, trial counsel had conducted a mitigation investigation and sought to introduce pertinent mitigating evidence at trial. The defendant interfered with the presentation of evidence, instructed his attorney not to present it, and told the trial court on the record that he did not want the mitigation presentation to proceed. *Id.* at 469. Because the defendant "refused to allow the presentation of any mitigating evidence" at his trial, he could not have prevailed on an IAC claim, because "regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence." *Id.* at 477. Nothing in *Landrigan* suggests that trial counsel is relieved of investigative responsibilities because of a defendant's reluctance to pursue certain avenues of mitigation; the decision turned entirely on the absence of prejudice given that the defendant was unwilling to permit its introduction under any circumstances. Moreover, *Landrigan* involved an extreme case of client resistance. The defendant did not merely fail to assist in the investigation or ask his

attorney not to interview certain witnesses; he actively resisted his lawyers' efforts and forbade them from introducing *any* mitigation under *any* circumstances. As this Court observed (quoting from a lower court opinion): "In the constellation of refusals to have mitigating evidence presented . . . this case is surely a bright star." *Id.* at 477 (quotation marks and citation omitted).

Landrigan does not support the view that inadequate mitigation investigation can be justified by a client's reluctance to contact particular witnesses. Indeed, this Court's summary reversal in *Porter v. McCollum*, 558 U.S. 30 (2009), is strikingly similar to this case. There, as here, the defendant "instructed [counsel] not to speak" with particular family members. *Id.* at 40. Indeed, unlike Petitioner, Porter was described as "fatalistic and uncooperative." *Id.* But this Court found ineffective assistance of counsel because Porter's lawyer "failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service." *Id.* The fact that Porter had instructed counsel not to contact his ex-wife or son did not "obviate the need for defense counsel to conduct *some* sort of mitigation investigation," especially given that "Porter did not give him any other instructions limiting the witnesses he could interview." *Id.* Other circuits have likewise refused to transform *Landrigan* into a blank check for trial counsel to forego mitigation simply because a defendant has some misgivings with respect to particular witnesses or evidence. *See, e.g.*, *Blystone v. Horn*, 664 F.3d

397, 422-27 (3d Cir. 2011) (granting relief and distinguishing *Landrigan* despite an in-court waiver of mitigation presentation, observing that "[c]ounsel cannot avoid the consequences of his inadequate preparation simply by virtue of the serendipitous occurrence that, on the day of sentencing, his client stuck with the decision not to go forward with a mitigation case"); *Gray v. Branker*, 529 F.3d 220, 230-34 (4th Cir. 2008) (holding the state court's reliance on *Landrigan* unreasonable and counsel's performance ineffective despite Gray's statement that he didn't want to spend his own money on a psychiatric evaluation: "Nothing in *Schriro* permits Gray's statement to be used to relieve his counsel of their duty to investigate for mitigating mental health evidence."); *Hamilton v. Ayers*, 583 F.3d 1100, 1118-20 (9th Cir. 2009) (finding counsel's performance ineffective, emphasizing that *Landrigan* does not obviate counsel's responsibility to undertake mitigation investigation, and observing that "at most Hamilton refused to assist in his defense; he did not impede the many other avenues of mitigating evidence available to counsel"); *see also Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (holding counsel's failure to investigate sentencing phase evidence unreasonable despite the fact that "Rompilla was even actively obstructive" to the investigation).

This Court's approach is informed by professional norms for capital trial representation. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require counsel to conduct a thorough and independent investigation

relating to the issues of both guilt and penalty, and "the investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003), Guideline 10.7(A)(2) (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1015 (2003) ("*ABA Guidelines*"). The commentary to the Guidelines makes clear that "[t]he duty to investigate exists regardless of the expressed desires of the client." Guideline 10.7, comment., 31 Hofstra L. Rev. at 1021 & n.206 (*citing Hardwick v. Crosby*, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) ("Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty"); *Blanco v. Singletary*, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow client to make an informed decision to waive mitigation)). The Guidelines recognize that defendants facing the death penalty often experience a mix of anxiety, embarrassment, and hopelessness which might cause them to hesitate to support a comprehensive mitigation investigation. These emotions will be especially powerful when the evidence to be uncovered involves traumatic experiences or the pursuit of such evidence might damage family relationships. Trial lawyers must develop trusting

relationships with their clients to work past these hesitations, which accounts in part for the separate Guideline requirement of extensive and meaningful client contact. *ABA Guidelines*, Guideline 10.5 ("Relationship with the Client"), reprinted in 31 Hofstra L. Rev. at 1005.

The Fifth Circuit's contrary approach encourages trial counsel to use a client's temporary resistance to mitigation investigation as a reason to abandon the mitigation effort entirely. Worse still, the golden bullet of a client's purported "obstreperousness" can provide a post hoc, self-serving explanation when trial counsel fails to pursue a professional mitigation investigation and is later confronted with a claim of ineffective representation.

In light of its recognition that trial counsel failed to conduct any mental health evaluation of Petitioner, the Fifth Circuit's corrected opinion does not ground its rejection of funding on Petitioner's initial qualms about contacting certain family members. JA 404. But the inclination to reject IAC claims based on such minimal expressions of client hesitation in other Fifth Circuit decisions, as well as the district court's inappropriate reliance on that ground in its funding denial, warrants this rebuttal.

CONCLUSION

Petitioner's trial attorneys waited until the last minute to prepare for trial, undertook rudimentary

mitigation investigation, and presented essentially no punishment-phase mitigation case, despite their awareness of Petitioner's multiple head traumas and history of substance abuse. The record offers little information about Petitioner's involvement in the offense, and the jury's conviction under the law of parties reflects uncertainty whether Petitioner actually killed the victim or intended her death. After trial, Petitioner was diagnosed with schizophrenia. Nonetheless, the Fifth Circuit denied funding to investigate Petitioner's IAC claim because of its assessment that his IAC claim is not viable. This conclusion rests on the implausible factual assertion that the "brutality" of the instant crime would have yielded a death sentence regardless of any mitigating evidence presented, including evidence of serious mental illness or the influence of drugs at the time of the offense. It rests also on the erroneous legal assertion that mitigating evidence – even where such evidence drastically reduces culpability on the part of a defendant – is unlikely to persuade even one juror to withhold death in cases involving significant aggravation. The Fifth Circuit's analysis cannot be reconciled with either this Court's decisions finding prejudice in cases involving substantially greater aggravation or with the professional norms and experience animating American death penalty law.

Nor can Petitioner's IAC claim be dismissed on the ground of his initial reluctance to have trial counsel contact certain relatives. That direction did not

amount to a blank check to forego mitigation investigation and cannot redeem trial counsel's failure to discover and introduce evidence which could have transformed the jury's appraisal of Petitioner's culpability. The Fifth Circuit's draconian approach in cases where trial lawyers claim their clients were uncooperative does not adhere to this Court's decisions and undermines important representational norms. Stripped of these mistaken articulations and applications of Sixth Amendment law, the denial of funding in this case cannot stand.

Equally important, if this Court were to reverse the denial of funding, there is a substantial risk that the litigation on remand would remain distorted by the inappropriate approaches to performance and prejudice contained in the district court and Fifth Circuit opinions. Those courts must recognize that powerful mitigating evidence can establish prejudice, even if they regard the crime as particularly brutal; and they must acknowledge that Petitioner's initial qualms about contacting certain family members do not estop

him from challenging trial counsel's failure to uncover and present mitigating evidence.

Respectfully submitted,

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On Writ of Certiorari to the
United States Court of Appeals
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BRIEF OF *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. ACCESS TO EXPERT, INVESTIGATIVE, AND OTHER SERVICES IS ESSENTIAL TO THE INTEGRITY OF CAPITAL PROCEEDINGS 5

A. Section 3599 Services Are Indispensable To Effective Representation In Federal Capital Trials 6

B. Section 3599 Services Also Play A Crucial Role In Enforcing The Right To Counsel In State Courts 10

II. A HEIGHTENED STANDARD OF REASONABLE NECESSITY WOULD EXACERBATE DISPARITIES IN CAPITAL CASES 15

A. A Heightened Standard Contravenes Congress's Intent To Assure Fairness in Capital Litigation 16

B. Adopting A Heightened Standard Would Raise Serious Constitutional Concerns 21

CONCLUSION 22

ADDENDUM—Members of the Constitution Project's National Right to Counsel Committee 1a

TABLE OF AUTHORITIES

Page

CASES:

Ake v. *Oklahoma*,
470 U.S. 68 (1985) 6, 8

Bright v. *State*,
455 S.E.2d 37 (Ga. 1995) 8

Cox v. *Horn*,
757 F.3d 113 (3d Cir. 2014) 11

Eddings v. *Oklahoma*,
455 U.S. 104 (1982) 21

Ex parte Graves,
70 S.W.3d 103 (Tex. Crim. App. 2002) 13

Ex parte Moody,
684 So. 2d 114 (Ala. 1996) 19

Gideon v. *Wainwright*,
372 U.S. 335 (1963) 6

Gregg v. *Georgia*,
428 U.S. 153 (1976) 4, 21

Griffin v. *Illinois*,
351 U.S. 12 (1956) 6, 16

Martel v. *Clair*,
565 U.S. 648 (2012) 3, 5, 7, 16, 21

Martinez v. *Ryan*,
566 U.S. 1 (2012) 4, 6, 10, 11, 13, 14

Melendez-Diaz v. *Massachusetts*,
557 U.S. 305 (2009) 17

Missouri v. *Huchting*,
927 S.W.2d 411 (Mo. Ct. App. 1996) 8

McFarland v. *Scott*,
512 U.S. 849 (1994) 20

TABLE OF AUTHORITIES—Continued

Page

People v. *Lopez*,
175 P.3d 4 (Cal. 2008) 11

Powell v. *Alabama*,
287 U.S. 45 (1932) 6

Rompilla v. *Beard*,
545 U.S. 374 (2005) 7

Scott v. *Louisiana*,
934 F.2d 631 (5th Cir. 1991) 8

Strickland v. *Washington*,
466 U.S. 668 (1984) 7, 9

Trevino v. *Thaler*,
133 S. Ct. 1911 (2013) 10, 11, 13, 14

United States v. *Cronic*,
466 U.S. 648 (1984) 6

United States v. *Snarr*,
704 F.3d 368 (5th Cir. 2013) 8

Wiggins v. *Smith*,
539 U.S. 510 (2003) 3, 5, 7, 14

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend V 7

U.S. Const. amend VI 3, 7, 11, 15, 18

STATUTES:

Criminal Justice Act of 1964:

18 U.S.C. § 3006A 5, 18

18 U.S.C. § 3006A(e)(2) 19

18 U.S.C. § 3006A(e)(3) 5

18 U.S.C. § 3006A(g) 18

18 U.S.C. § 3599 ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

18 U.S.C. § 3599(a) 5

18 U.S.C. § 3599(d) 7

18 U.S.C. § 3599(f) 3, 5, 15, 18, 21

18 U.S.C. § 3599(g)(2) 5, 15

28 U.S.C. § 2265 13

REGULATION:

28 C.F.R. § 26.23 13

OTHER AUTHORITIES:

American Bar Association:

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) 7

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The Alabama Death Penalty Assessment Report (2006) 12

The Arizona Death Penalty Assessment Report (2006) 19

The Florida Death Penalty Assessment Report (2006) 20

The Missouri Death Penalty Assessment Report (2012) 12, 20

TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009) 2, 8, 10, 19

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BRIEF OF *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

The Constitution Project (TCP) is an independent, not-for-profit organization that seeks consensus solutions to challenging constitutional issues. TCP pursues these objectives through scholarship, advocacy, and public education efforts. As part of that effort, TCP testifies before Congress, holds regular

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of amicus curiae briefs in this case.

briefings with legislative staff, and frequently appears as *amicus curiae* before this and other courts.

The systemic deprivation of the right to counsel has long been among TCP's primary concerns. To address this issue, TCP assembled a National Right to Counsel Committee comprising independent experts who represent all segments of America's justice system. The Committee's members, listed in an addendum to this brief, include Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others.

In 2009, the Committee issued its seminal report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which presented the Committee's findings on the state of the constitutional right to counsel nationwide. The report offers 22 consensus recommendations. It calls upon jurisdictions to properly fund and administer indigent defense systems and urges other players—including the federal government, state bar associations, prosecutors, and judges—to address the crisis of indigent representation.

Among its findings, the Committee concluded that a lack of access to and funding for expert and investigative services seriously undermines the ability of appointed counsel to effectively defend indigent clients. Requiring a death-sentenced prisoner to show a "substantial need" for expert and investigative services would both exacerbate these challenges and deepen unacceptable disparities in the administration of justice nationwide. TCP therefore urges this Court to adopt petitioner's standard and reverse the judgment below.

SUMMARY OF ARGUMENT

I. Congress enacted Section 3599 out of a conviction "'that quality legal representation is necessary' in all capital proceedings to foster fundamental fairness in the imposition of the death penalty." *Martel* v. *Clair*, 565 U.S. 648, 659 (2012) (internal quotation marks omitted). Among the "myriad ways" it "seeks to promote effective representation for persons threatened with capital punishment," *id.* at 660, the statute funds "investigative, expert, or other services [that] are reasonably necessary for the representation" of federal defendants and *habeas* petitioners. 18 U.S.C. § 3599(f).

These services are essential to providing constitutionally adequate representation in federal capital trials. Counsel cannot discharge their Sixth Amendment obligations without the means to investigate "reasonably available mitigating evidence" and the facts necessary to rebut the prosecution's case. *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (internal quotation marks and emphasis omitted). And when a lack of resources leads to higher rates of serious error in capital adjudications, the public rightly questions the fundamental fairness and integrity of the adversarial system.

Section 3599's promise of expert and investigative services plays an equally important role in providing an effective remedy for Sixth Amendment violations in *state* courts. Constitutionally deficient representation is endemic in state capital proceedings. Yet ineffective-assistance claims often cannot be raised until collateral review where they are too often defaulted by deficient counsel or *pro se* defendants. When that happens, federal *habeas* proceedings offer

the first meaningful opportunity to challenge trial counsel's performance. Without access to Section 3599 services, however, even skilled counsel may be unable to develop the evidence needed to present a meritorious claim. *See Martinez* v. *Ryan*, 566 U.S. 1, 13 (2012).

II. Petitioner's interpretation of Section 3599 respects the careful balance Congress struck between the need to conserve public funds and an indigent defendant's right to pursue the same claims and defenses that would be available to a non-indigent defendant.

A heightened standard of "reasonable necessity" would directly undercut the statute's purpose. It would aggravate entrenched disparities between indigent defendants and those able to retain their own attorneys, as well as between defendants represented by counsel appointed from the private bar and those represented by federal defenders. A heightened standard would also stunt Section 3599's potential to provide a level playing field for defendants subject to geographic disparities in the quality of representation offered in state courts.

That would not only contravene congressional intent; it would also raise grave constitutional concerns. By making it more likely that the quality of a capital defendant's counsel will turn on factors such as resources and geography, a heightened standard would create a "substantial risk" that the ultimate sanction will be "inflicted in an arbitrary and capricious manner" incompatible with the Constitution. *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell & Stevens, JJ). This Court should reverse.

ARGUMENT

I. ACCESS TO EXPERT, INVESTIGATIVE, AND OTHER SERVICES IS ESSENTIAL TO THE INTEGRITY OF CAPITAL PROCEEDINGS

Section 3599 "aims in multiple ways to improve the quality of representation afforded to [both] capital petitioners and defendants alike." *Martel* v. *Clair*, 565 U.S. 648, 659 (2012). Among these measures, the statute's provision for "investigative, expert, or other reasonably necessary services" is especially significant. 18 U.S.C. § 3599(a).[2]

For indigent defendants standing trial in federal court, the statute's guarantee of funding for "reasonably necessary" services, *id.* at § 3599(f), enables counsel to carry out their constitutional duty to thoroughly investigate their client's guilt and "discover all reasonably available mitigating evidence." *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (internal quotation marks and emphasis omitted). For petitioners convicted in state courts, access to Section 3599 services plays a crucial role in cases where federal *habeas* proceedings offer the first meaningful

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[2] Before the passage of the provisions now codified at Section 3599, the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, "governed the appointment of counsel in *all* federal criminal cases and habeas litigation." *Martel*, 565 U.S. at 658. The CJA also provides for "reasonably necessary" services, but Section 3599 tripled the amount of money a judge can authorize for such services without making an additional finding that the services are "necessary to provide fair compensation for services of an unusual character or duration." *Compare* 18 U.S.C. § 3006A(e)(3), *with id.* § 3599(g)(2).

opportunity to raise ineffective-assistance claims. *See Martinez* v. *Ryan*, 566 U.S. 1, 10-11 (2012).

A. Section 3599 Services Are Indispensable To Effective Representation In Federal Capital Trials

This Court has repeatedly recognized that "the right to counsel is the foundation of our adversary system." *Martinez*, 566 U.S. at 12; *see Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963); *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932). Indeed, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (internal quotation marks omitted).

But the Constitution requires more than a reasonably competent attorney. Defendants are "entitle[d] * * * to an adequate opportunity to present their claims fairly within the adversary system." *Ake* v. *Oklahoma*, 470 U.S. 68, 77 (1985) (internal quotation marks omitted). And that means they must have "access to the raw materials integral to the building of an effective defense." *Id.*; *see Griffin* v. *Illinois*, 351 U.S. 12, 18-20 (1956) (holding that indigent defendants must have access to trial transcripts at no cost in an as-of-right appeal). Marshaling these "raw materials" in a capital case requires the help of experts, investigators, and other specialists. Integral as they are to counsel's ability to effectively present a defense, such services "are necessities, not luxuries." *Gideon*, 372 U.S. at 344.

Section 3599 aims to provide these necessary services "in light of what it calls 'the seriousness of the possible penalty and the unique and complex nature

of the litigation.'" *Martel*, 565 U.S. at 659 (quoting 18 U.S.C. § 3599(d) (ellipses omitted)). But the statute's guarantees are not only good legislative policy; they are also compelled by the Constitution and the public's overriding interest in the integrity of the adversarial system.

1. The constitutional right to expert and investigative services is rooted in the Fifth and Sixth Amendments. In *Wiggins*, for example, this Court held that the Sixth Amendment requires counsel in a capital case to undertake a reasonable investigation of the defendant's background. 539 U.S. at 522-524. The Court based its assessment of the attorneys' efforts in that case in part on the American Bar Association's guidelines for appointed counsel in capital cases. *Id.* at 524; *see also Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005) (similarly analyzing reasonableness in light of ABA Guidelines); *Strickland* v. *Washington*, 466 U.S. 668, 688-689 (1984) (same). The Court concluded that the investigation was constitutionally deficient in light of the "well-defined" norm that counsel should seek to "'discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (quoting ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.4.1(C), at 93 (1989)).

Attorneys cannot be and are not expected to carry out such investigations entirely on their own. On the contrary, the ABA's revised Guidelines instruct that "[c]ounsel *must* promptly obtain the investigative resources necessary to prepare for both [the penalty and guilt] phases, including *at minimum* the assistance of a professional investigator and a mitigation

specialist, as well as all professional expertise appropriate to the case." ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 925 (2003) (emphases added); *see id.* at 999-1000, 1003-04; ABA, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677, 677 (2008). This Court's precedents teach that such assistance, made possible in federal cases by Section 3599, is not only a practical necessity; it is a constitutional imperative.

Other services are required as a matter of due process. This Court held in *Ake* that an indigent defendant is entitled to the appointment of a "competent psychiatrist" where "his sanity at the time of the offense is to be a significant factor at trial." 470 U.S. at 83. State and lower federal courts have since extended *Ake*'s reasoning to "[n]on-psychiatric experts" where the evidence they would provide "is both critical to the conviction and subject to varying expert opinion." *United States* v. *Snarr*, 704 F.3d 368, 405 (5th Cir. 2013) (internal quotation marks omitted); *see also, e.g.*, *Scott* v. *Louisiana*, 934 F.2d 631, 633 (5th Cir. 1991) (ballistics experts); *Bright* v. *State*, 455 S.E.2d 37, 51 (Ga. 1995) (toxicologists); *Missouri* v. *Huchting*, 927 S.W.2d 411, 419 (Mo. Ct. App. 1996) (DNA experts).

2. Guaranteeing access to expert and investigative services at trial is also essential to the public's overriding interest in the fundamental fairness and integrity of the adversarial system. *See Justice Denied*, *supra* at 6, 44-47.

The failure to conduct a proper investigation is a leading cause of constitutionally deficient representation—that is, representation in which there is a reasonable probability that the *outcome would have been different* but for counsel's performance. *See* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 Cal. W. L. Rev. 263, 277, 321-324 (2009) (finding that the failure to conduct a proper investigation was a factor in 44% of ineffective assistance of counsel decisions in a study of California cases); *Strickland*, 466 U.S. at 687.

By contrast, when appointed counsel have the resources to conduct adequate investigations and develop mitigation cases, capital proceedings produce verdicts that are less likely to be overturned on review. *See* Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 Ind. L. Rev. 495, 505-512 (1996) (suggesting, in a study of capital prosecutions in Indiana, that enhanced resources for appointed counsel reduced the number of cases resulting in death sentences); James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 302-303, 413-414 (2002) (finding a correlation between reduced state capital-sentencing rates and reduced rates of errors in capital cases).[3]

When counsel's inability to access needed resources leads to higher rates of serious error in capital cases,

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[3] *Available at* http://www2.law.columbia.edu/brokensystem2/report.pdf.

the inevitable effect is to erode the public's confidence in the fairness and reliability of our justice system. That is precisely the result Section 3599 is intended to prevent.

B. Section 3599 Services Also Play A Crucial Role In Enforcing The Right To Counsel In State Courts

While Section 3599 directly addresses the quality of representation at trial only in federal capital prosecutions, the statute also assists federal *habeas* petitioners denied effective counsel in state courts. In some cases, federal proceedings will offer state prisoners their first meaningful opportunity to raise ineffective-assistance claims. *See, e.g.*, *Martinez*, 566 U.S. at 14; *Trevino* v. *Thaler*, 133 S. Ct. 1911, 1918, 1921 (2013). And because such claims "often depend on evidence outside the trial record," *Martinez*, 566 U.S. at 13, Section 3599 services are essential to developing and presenting meritorious claims.

1. Constitutionally deficient representation is endemic in state capital trials. *See, generally*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1841-66 (1994). Indeed, one comprehensive study of state death sentences from 1973 to 1995 concluded that "the largest single reason why courts reverse capital verdicts is egregiously incompetent representation of capital defendants by mainly state-funded lawyers—prompting close to 40% of all state post-conviction reversals, and close to 30% of all federal habeas reversals." *A Broken System*, *supra* at 370; *see generally Justice Denied*, *supra* at 47 (noting the role of inadequate representation in wrongful convic-

tions). And data on exonerations suggests that inadequate representation was an issue in more than a quarter of capital cases in which the defendant was eventually cleared. *See* Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited June 16, 2017). To make matters worse, the quality of representation is lowest in some of the jurisdictions that account for the lion's share of capital sentences. *See* Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. Rev. 227, 260-265 (2012).

A variety of practical and procedural barriers can make it difficult or impossible to raise a Sixth Amendment violation on direct review from a conviction, however. Among other things, ineffective-assistance claims "normally require a different attorney." *Trevino*, 133 S. Ct. at 1917. The "[a]bbreviated deadlines" of direct appeals may not allow a defendant to investigate the factual basis for the claim. *Martinez*, 566 U.S. at 13. And the lack of an evidentiary hearing on appeal may make it more difficult to establish the necessary record. *See id.*

As a result, some States bar or effectively prevent defendants from raising ineffective-assistance challenges on direct review. That is the case in Arizona, California, Pennsylvania, and Texas—four of the eight States responsible for the vast majority of death sentences returned from 2004 to 2009. *See* Smith, 92 B.U. L. Rev. at 230-231; *Trevino*, 133 S. Ct. at 1921 (Texas); *Martinez*, 566 U.S. at 6 (Arizona); *Cox* v. *Horn*, 757 F.3d 113, 124 n.8 (3d Cir. 2014) (Pennsylvania); *People* v. *Lopez*, 175 P.3d 4, 12 (Cal. 2008) (California). Defendants in these States must wait until state post-conviction proceedings to raise ineffective-assistance claims.

The shortage of resources available to indigent petitioners in these *state* collateral review proceedings means that ineffective-assistance claims may themselves fall victim to ineffective counsel. *See* Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 Yale L. J. 2604, 2609-11 (2013). Some of the States most active in imposing death sentences appoint post-conviction counsel only in limited circumstances. *See, e.g.*, ABA, *The Alabama Death Penalty Assessment Report* 111 (2006) (finding that counsel are "infrequently" appointed under Alabama's discretionary system);[4] ABA, *The Missouri Death Penalty Assessment Report* 184 (2012) (explaining that Missouri provides counsel only after an indigent death row inmate has filed a facially sufficient motion for relief *pro se*).[5] Others provide counsel without requiring that the counsel be effective. *See* Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1086-87 (2006) (noting that only fourteen of the thirty-seven States that have capital punishment have such a requirement). In Texas, where "competent counsel" *is* required by statute, courts have refused to look beyond "counsel's qualifications, experience, and abilities at the time of his appointment," regardless

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[4] *Available at* https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf.

[5] *Available at* https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf.

of actual performance. *Ex parte Graves*, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002).[6]

Indeed, the ABA has observed that "the intertwined realities of chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance" in post-conviction proceedings. 31 Hofstra L. Rev. at 932 n.47 (citation omitted); *see* John B. Gould & Lisa Greenman, *Report to the Committee on Defender Services of the Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* 87-97 (2010) (noting that "[a]mong the problems resulting from the appointment of inexperienced post-conviction counsel was a failure to fully investigate potential post-conviction claims").[7]

When post-conviction counsel is absent or ineffective, federal *habeas* proceedings offer the first meaningful opportunity to challenge trial counsel's performance. *Cf. Martinez*, 566 U.S. at 10 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."); *Trevino*, 133 S.Ct. at 1918

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[6] Federal law offers certain procedural benefits to States certified by the Attorney General as having "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265; 28 C.F.R. § 26.23. To date, no State has obtained the necessary certification.

[7] *Available at* http://www.uscourts.gov/sites/default/files/fdpc2010.pdf.

(similar). In such cases, Section 3599 services play a central role in ensuring the fairness and integrity of state proceedings.

2. This Court has recognized that "[i]neffective-assistance claims often depend on evidence outside the trial record." *Martinez*, 566 U.S. at 13. In capital cases, developing that evidence frequently requires undertaking the investigation of the defendant's background that trial counsel was allegedly unreasonable in failing to perform. Expert and investigative services are essential to that effort.

This very case illustrates the problem, but there are others. Take *Wiggins*. The defendant's post-conviction counsel in that case established trial counsel's ineffectiveness by commissioning an expert report from a licensed social worker that set forth defendant's "dysfunctional background." 539 U.S. at 516-517. In *Trevino*, the defendant's federal *habeas* counsel relied on the "mitigating matters that his own investigation had brought to light" to argue that trial counsel's efforts were deficient. 133 S. Ct. at 1916.

Without access to expert and investigative services, even highly-skilled and fairly-compensated *habeas* counsel may be unable to present meritorious claims. Indeed, "the prevailing national standard of practice *forbids* counsel from shouldering primary responsibility for the investigation" precisely because counsel will ordinarily lack the time to devote to the effort while simultaneously litigating the case. 31 Hofstra L. Rev. at 958 (emphasis added). And experts such as mitigation specialists may "possess clinical and information-gathering skills and training that most lawyers simply do not have." *Id.* at 959.

For indigent state prisoners prevented from raising Sixth Amendment claims until federal *habeas* review, Section 3599 funding is therefore essential to fulfilling the Constitution's guarantee.

II. A HEIGHTENED STANDARD OF REASONABLE NECESSITY WOULD EXACERBATE DISPARITIES IN CAPITAL CASES

A private attorney retained by a defendant of means need not seek court approval before hiring an expert or investigator. She need not make a special showing to preserve the confidentiality of her budget or to obtain additional funding when that budget exceeds a set amount. She is free, in short, to act on her professional judgment within the limits of the resources available.

Properly construed, Section 3599 gives the same deference to the judgment of appointed counsel in a capital case. *See* Pet. Br. 25. The statute protects the public fisc by requiring that counsel satisfy a court that the requested services are necessary and that any exceptional expenses are justified. 18 U.S.C. § 3599(f), (g)(2). But it balances those constraints against an indigent defendant's right to pursue the same claims and defenses that would be available to non-indigent defendants.

The "substantial need" standard applied by the Fifth Circuit here distorts that balance. Petitioner has explained how that standard contradicts the statute's text, ignores its history, and runs counter to its purpose. Pet. Br. 27-43. By making it relatively harder for indigent defendants to access needed services, the Fifth Circuit's heightened standard also risks increasing the effect on capital sentences of

factors that have nothing to do with a defendant's culpability or the integrity of the proceedings, such as the defendant's resources and geography. Congress cannot have intended and the Constitution cannot countenance that result.

A. A Heightened Standard Contravenes Congress' Intent To Assure Fairness In Capital Litigation

Section 3599 "grants federal capital defendants and capital habeas petitioners enhanced rights of representation" in order "to foster fundamental fairness in the imposition of the death penalty." *Martel*, 565 U.S. at 659 (internal quotation marks omitted). The "substantial need" standard undermines that purpose by aggravating resource disparities faced by capital defendants in federal proceedings and thwarting the statute's potential to mitigate the disparities that affect state-court proceedings.

1. Start with the obvious disparity between defendants who can hire counsel—any counsel—and those who cannot. This Court has long recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin*, 351 U.S. at 19. Yet studies of state-court cases suggest that the kind of trial a capital defendant gets does indeed depend on his ability to hire counsel, even if he can only afford to retain an attorney for a portion of the proceedings. A heightened standard for reasonable necessity risks making that problem worse.

A study of one of the nation's most active death penalty jurisdictions found that relying on retained counsel for just part of the proceedings dramatically reduced the chances that an individual defendant

would ultimately be sentenced to death. Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. Crim. L. & Criminology 717, 732, 741-743 (2009); *see also* James C. Beck & Robert Shumsky, *A Comparison of Retained and Appointed Counsel in Cases of Capital Murder*, 21 Law & Hum. Behav. 525 (1997) (drawing similar conclusions from a study of Georgia cases from the 1970s); Bright, 103 Yale L. J. at 1837-66 (providing anecdotal evidence). The 129 defendants in the study who were able to rely entirely on retained counsel fared even better: not one of them was sentenced to die, even though they "were just as likely to have been indicted for the most heinous murders." Phillips, 99 J. Crim. L. & Criminology at 741. Notably, the study found that defendants who hired private attorneys did not enjoy higher socioeconomic status than those who did not; indeed, many had to have counsel appointed at some other point in the proceedings. *Id.* at 722, 733, 748. In short, defendants with appointed counsel are at a disadvantage even controlling for socioeconomic status and the nature of the offenses charged.[8]

Access to expert and investigative services is crucial to providing effective representation to indigent defendants. *See supra* pp. 6-10. And it is also necessary to a defendant's ability to exercise other core trial rights, such as the right to cross-examine prosecution experts. *Cf. Melendez-Diaz* v. *Massachusetts*,

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[8] While *amicus* is not aware of any similar empirical comparison of retained and appointed counsel in federal capital trials, the experience of state-court defendants illustrates the problems that arise when some defendants must rely on counsel conscripted by the courts, while others are able to engage counsel privately.

557 U.S. 305, 320-321 (2009) (holding that the Confrontation Clause requires giving a defendant the opportunity to cross-examine expert witnesses on their "judgment" and "methodology"). It stands to reason that a standard that constrains such services for defendants with appointed counsel is likely to contribute to the disparate outcomes faced by defendants unable to retain their own attorneys.

2. Even among defendants with appointed counsel, the choice of appointment can create inequities. Under the Criminal Justice Act of 1984, 18 U.S.C. § 3006A, counsel for indigent defendants may be appointed either from a pre-selected "panel" of private attorneys or from a federally-funded public defender organization. *See* David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 Cornell L. Rev. 335, 352 (2017).[9] Unlike their private counterparts, public defender organizations typically have investigators on staff and have budgets to cover the costs of hiring experts for indigent clients. *Id.* at 353. Defendants fortunate enough to be appointed an Assistant Federal Defender are thus unlikely to find themselves in the dilemma petitioner faced in this case. By contrast, private counsel appointed to represent capital defendants must rely on Section 3599(f) requests to access services, creating the potential for "[t]wo tiers of representation." Nat'l Ass'n of Crim. Def. Lawyers, *Federal Indigent Defense 2015: The Independ-*

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[9] The Administrative Office of the U.S. Courts oversees two kinds of "defender organizations": Federal Public Defender Organizations staffed by federal employees and federally funded, non-profit Community Defender Organizations. 18 U.S.C. § 3006A(g).

ence Imperative 43 (2015) (discussing access to services under 18 U.S.C. § 3006A(e)(2)).[10] Requiring panel attorneys to meet the heightened "substantial need" standard would only aggravate that entrenched disparity.

3. Finally, a heightened standard would undercut Section 3599's potential to mitigate geographic disparities that affect state-court proceedings.

States vary widely in their approaches to providing indigent defense. *See Justice Denied*, *supra* at 52-64. Not all ensure ready access to expert and investigative services. Alabama, for example, requires an indigent defendant to "show, with reasonable specificity, that the expert is *absolutely necessary* to answer a substantial issue or question raised by the state or to support a critical element of the defense." *Ex parte Moody*, 684 So. 2d 114, 119 (Ala. 1996) (per curiam) (emphasis added). In Arizona, "public defender offices, especially in rural counties, have to beg for more money for experts and investigators." ABA, *The Arizona Death Penalty Assessment Report* 156 (2006) (internal quotation marks and brackets omitted).[11] And in Texas, the State funds investigators and mitigation specialists in its public defender offices, but list-qualified appointed counsel in the most active death penalty jurisdictions must seek funding from elected judges in a system that the ABA has warned "invites uneven treatment." ABA,

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[10] *Available at* www.nacdl.org/federalindigentdefense2015 (last visited June 12, 2017).

[11] *Available at* https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/arizona/Report.authcheckdam.pdf.

The Texas Capital Punishment Assessment Report 154 (2013).[12] Other States, like Florida and Missouri, make expert and investigative services more readily available to indigent defendants. *See* ABA, *The Florida Death Penalty Assessment Report* 178-179 (2006);[13] *The Missouri Death Penalty Assessment Report*, *supra* at 177-179. But that just underscores the extent of the disparity.

Congress extended Section 3599's enhanced protections to state prisoners because it recognized "that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994). And while the federal courts cannot assume the States' constitutional obligations, they can in some cases serve as an essential backstop. *See supra* pp. 10-15. When a defendant deprived of adequate expert or investigative assistance in state court is able to invoke Section 3599 in federal court, a "reasonable attorney" standard may help mitigate the disparity between States that offer appointed counsel the services they need to provide constitutionally sufficient representation and those that do not.

* * *

Section 3599 "seeks to promote effective representation for persons threatened with capital punish-

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[12] *Available at* https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf.

[13] *Available at* https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf.

ment" in "myriad ways." *Martel*, 565 U.S. at 660. "With all those measures pointing in one direction," it would make no sense to think Congress meant the reasonable necessity standard in Section 3599(f) to "head the opposite way." *Id.* at 659-660. As petitioner has explained, the "substantial need" standard makes it *more* difficult for a capital defendant to obtain services than it would be for an ordinary federal defendant proceeding under the CJA. Pet. Br. 30-39. This Court rejected a similarly retrograde reading of Section 3599 in *Martel*. It should do so again here.

B. Adopting A Heightened Standard Would Raise Serious Constitutional Concerns

Even if Section 3599's text, history, and purpose did not foreclose the "substantial need" standard, petitioner would have the better reading of the statute. This Court has long "insiste[d] that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982). A reading of Section 3599 that exacerbates the entrenched disparities among capital defendants would run directly counter to that admonition.

When a capital defendant's ability to develop the factual basis of his claims and defenses turns on whether he is indigent or able to retain a lawyer, whether his appointed counsel is a private attorney or a federal employee, or on whether he was tried in Alabama or Florida, there is a "substantial risk" that the ultimate sanction will be "inflicted in an arbitrary and capricious manner" incompatible with the Constitution. *Gregg* v. *Georgia*, 428 U.S. 153, 188

(1976) (opinion of Stewart, Powell, and Stevens, JJ). This Court cannot abide that risk.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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Supreme Court of the United States

CARLOS MANUEL AYESTAS,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice (Institutional Division),

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Federal Habeas Case Law Is Replete With Examples Showing The Importance Of Funding For Investigation And Experts—Funding That Is All But Impossible To Obtain Under The Fifth Circuit's Approach 5

1. *Brumfield v. Cain* 7

2. *Williams v. Taylor* 9

3. *Campbell v. Johnson* 12

4. *Gonzalez v. Wong* 16

5. *Porter v. McCollum* 18

6. *Milke v. Ryan* 20

II. The Fifth Circuit's Standard Discourages Attorneys Who Rely On The Criminal Justice Act From Seeking Resources Or Even Accepting Capital Habeas Cases Altogether 23

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 7

Brumfield v. Cain, 135 S. Ct. 2269 (2015) 4, 7, 8, 9

Brumfield v. Cain, 808 F.3d 1041 (5th Cir. 2015) 9

Brumfield v. Cain, 854 F. Supp. 2d 366 (M.D. La. 2012) 22

Brumfield v. Cain, No. 04-CV-787, 2008 WL 2600140 (M.D. La. June 30, 2008) 8, 9

Buck v. Davis, 137 S. Ct. 759 (2017) 4

In re Campbell, 750 F.3d 523 (5th Cir. 2014) 12, 13, 14, 15

In re Campbell, 82 F. App'x 349 (5th Cir. 2003) 13

Campbell v. Stephens, No. 00-CV-3844, slip op. (S.D. Tex. May 11, 2015), ECF No. 90 14

DeBruce v. Commissioner, Alabama Department of Corrections, 758 F.3d 1263 (11th Cir. 2014) 20, 27

Ford v. Wainwright, 477 U.S. 399 (1986) 30

Gonzalez v. Wong, 667 F.3d 965 (9th Cir. 2011) 16, 17

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Maxwell v. Roe, 628 F.3d 486 (9th Cir. 2010) 17

McFarland v. Scott, 512 U.S. 849 (1994) 6

Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013) 20, 21

Moore v. Texas, 137 S. Ct. 1039 (2017) 4

People v. Gonzalez, 800 P.2d 1159 (Cal. 1990) 16

Porter v. Attorney General, 593 F.3d 1275 (11th Cir. 2010) 19

Porter v. Crosby, No. 6:03-CV-1465, 2007 WL 1747316 (M.D. Fla. June 18, 2007) 18, 19

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Wiggins v. Smith, 539 U.S. 510 (2003) 19

Williams v. Netherland, 181 F. Supp. 2d 604 (E.D. Va.), *aff'd sub nom. Williams v. True*, 39 F. App'x 830 (4th Cir. 2002) 10, 11

Williams v. Taylor, 528 U.S. 960 (1999) 11

Williams v. Taylor, 529 U.S. 420 (2000) 10, 11, 12, 22

STATUTES

18 U.S.C. § 3599(a)(2) 5

18 U.S.C. § 3599(f) 5, 23, 30

21 U.S.C. § 848(q)(4)(b) (1988 ed.) 5

28 U.S.C. § 2244(d) 26

Fla. Stat. Ann. § 27.701 18

Fla. Stat. Ann. § 27.711 18

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Frank Green, *Miscues Rule Out Execution for Killer*, Richmond Times Dispatch, Apr. 21, 2003, at A1 11

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Joint Advisory Concerning Campbell's Intellectual Disability Claim, *Campbell v. Davis*, No. 00-CV-3844 (S.D. Tex. May 10, 2017), ECF No. 138 ..... 14, 15

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Order Conditionally Granting Writ of Habeas Corpus, *Campbell v. Davis*, No. 00-CV-3844 (S.D. Tex. May 10, 2017), ECF No. 139 15

Hon. James R. Spencer, Hon. Robin J. Cauthron & Hon. Nancy G. Edmunds, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (May 1998), http://www.uscourts.gov/sites/default/files/original_spencer_report.pdf 28

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INTEREST OF *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958, and has a nationwide membership of many thousand direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. Each year, NACDL files numerous briefs as *amicus curiae* in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL and the clients its attorneys represent. NACDL's members depend on adequate expert and investigative resources in order to develop claims in

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[1] Petitioner and Respondent have both filed with this Court blanket letters of consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

habeas proceedings that may have been ignored, overlooked, or unavailable during a habeas petitioner's trial. And the clients NACDL's members represent similarly depend on the fair disbursement of those funds, in order to guarantee that their convictions and sentences were constitutionally imposed. In order to guarantee the just and fair administration of justice, NACDL has a strong interest in ensuring that habeas claims—particularly in capital cases—are adequately investigated.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court, both as direct counsel and as *amicus curiae*.

This case implicates several issues of importance to the ACLU's members, including guaranteeing the fair, non-discriminatory administration of justice and the adequate representation of poor or disadvantaged criminal defendants.

Together, NACDL and the ACLU urge this Court to reject the onerous standard the Fifth Circuit applies to funding requests under 18 U.S.C. § 3599(f)—a standard that, in practice, frustrates effective habeas investigations, and consequently representation.

SUMMARY OF ARGUMENT

The ability of counsel for a capital habeas petitioner to obtain investigative and expert resources during federal post-conviction proceedings is often essential to vindicating a meritorious claim and avoiding the imposition of an unconstitutional death sentence. Access to funding can mean the difference between life and death. This is not merely a theoretical point. In this brief *amici* canvass a number of representative cases in which post-conviction investigations conducted in federal and state court uncovered critical evidence supporting a meritorious claim that was previously overlooked or undeveloped at trial or on appeal. Adequate funding for investigations during habeas proceedings has prevented an intellectually disabled person from being unconstitutionally executed after trial counsel failed to establish the disability. It has uncovered critical mitigation evidence that the jury should have had the benefit of considering. And it has led to the discovery of exculpatory evidence unlawfully withheld by the prosecution. In each instance, evidence that was previously undeveloped substantiated a meritorious claim and thereby prevented an unconstitutional execution.

Congress recognized the importance of funding when it enacted 18 U.S.C. § 3599(f) and provided that funding would be available whenever "reasonably necessary for the representation" of a habeas petitioner in federal court. The Fifth Circuit's outlier "substantial need" standard for obtaining funding under Section 3599(f) severely limits counsel's access to the resources Congress intended to provide, thereby frustrating the

provision's express purpose and hindering the protection of constitutional rights. Once again, this is not merely a theoretical point. As *amici* discuss herein, the Fifth Circuit's standard is changing how counsel approach habeas representation in that Circuit—a Circuit in which both a significant number of capital convictions arise and a significant number of people are wrongly convicted and sentenced to death.[2] Some counsel refuse to ask for funding because they know the odds of obtaining it are so low. And still others will not take on habeas cases because they know they will not be able to do an adequate job without funding for investigators and experts.

Section 3599(f) applies to the whole country; there is no exception for the Fifth Circuit. To preserve access to critical representation-related resources under Section 3599(f), this Court should reaffirm that Congress meant precisely what it said: those resources should be available whenever "reasonably necessary for the

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[2] A large number of death-row exonerations have come from states under the jurisdiction of the Fifth Circuit. *See Innocence and the Death Penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/innocence-and-death-penalty (last updated May 12, 2017) (listing 13 exonerations in Texas, 11 exonerations in Louisiana, and 4 exonerations in Mississippi as of April 19, 2017). In recent years this Court has also reversed or vacated the lower courts' denial of relief in a number of death penalty cases arising from the Fifth Circuit or state courts in that circuit. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Buck v. Davis*, 137 S. Ct. 759 (2017); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015).

representation" of a petitioner in federal habeas proceedings. 18 U.S.C. § 3599(f).

ARGUMENT

I. Federal Habeas Case Law Is Replete With Examples Showing The Importance Of Funding For Investigation And Experts—Funding That Is All But Impossible To Obtain Under The Fifth Circuit's Approach.

When Congress enacted Section 3599(f) and its predecessor statute, it expressly provided that counsel seeking to set aside or vacate a death sentence in Section 2254 and Section 2255 collateral proceedings could request funding for investigative and expert resources. *See* 18 U.S.C. § 3599(a)(2); *see also* 21 U.S.C. § 848(q)(4)(b) (1988 ed.). In doing so, Congress recognized that such resources play a critical role in guaranteeing the adequate representation of capital petitioners in habeas proceedings. That recognition aligns with the established professional consensus that factual and expert investigation are essential during collateral post-conviction proceedings. *See, e.g., ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.15.1 (rev. ed. 2003).

Experience from a number of cases demonstrates that habeas counsel who have access to resources to undertake an effective investigation are frequently able to substantiate their clients' meritorious claims, even if that investigation is conducted for the first time in federal court. This should come as no surprise. This Court has emphasized that "[t]he services of investigators and other experts may be critical in the

preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *McFarland v. Scott*, 512 U.S. 849, 855 (1994). And since this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), holding that ineffectiveness of counsel in initial-review state collateral proceedings can provide cause to excuse procedural default of an ineffectiveness of trial counsel claim, expert and investigative resources have become even more important for some defendants. *See id.* at 9.

The cases *amici* detail below show that proper investigative resources and procedures can literally make the difference between life and death. In each case, federal courts granted death-row inmates habeas relief or permitted petitioners to return to state court to advance their claim. And in each case, that outcome turned entirely on evidence that was only developed during post-conviction proceedings. Although the evidence in these cases was not developed with Section 3599(f) funds and was instead developed with resources provided by Federal Public Defenders' offices, legal defense organizations, or by counsel themselves, when each case arrived in federal or state post-conviction proceedings, there was insufficient evidence to substantiate a meritorious claim. Thus, had petitioners or their counsel been required to rely on Section 3599(f) as interpreted by the Fifth Circuit, they might very well have been denied funding.

The cases discussed herein demonstrate that counsel with the resources to undertake proper investigations are able to substantiate their clients' meritorious claims, while counsel without such resources may not be able to

make the same showing—even if the clients have similar claims at the outset of the proceedings. A death-row inmate's chance to present his meritorious claims should not depend on the circuit in which he is convicted, or whether his counsel has the luxury of funding an investigation out of his own pocket.

1. *Brumfield v. Cain*. The case of Kevan Brumfield, which this Court considered just two terms ago, is a prototypical example. *See Brumfield v. Cain*, 135 S. Ct. 2269 (2015). As his case arrived in federal court, Brumfield possessed limited evidence to demonstrate that he was intellectually disabled and thus could not constitutionally be executed. Yet, investigative and expert funding provided for the first time at the federal level dramatically changed the outcome. Brumfield and his counsel were able to prove his intellectual disability with the aid of a newly conducted IQ test and expert. The district court that granted Brumfield's petition emphasized that without the evidence the investigation uncovered, Brumfield's claim might never have been successful.

Brumfield was sentenced to death by the state of Louisiana. *Brumfield*, 135 S. Ct. at 2273. This Court subsequently decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of intellectually disabled persons violates the Eighth Amendment. Brumfield amended his then-pending state petition for post-conviction relief to raise an *Atkins* claim, and sought an evidentiary hearing to explore that claim. *Brumfield*, 135 S. Ct. at 2273. While his original sentencing hearing, conducted before *Atkins*, had not focused on proving Brumfield's intellectual disability,

testimony from that hearing indicated that he had an IQ of 75, read at a fourth-grade level, and had been placed in special education classes.[3] *Id.* at 2274-75. To further develop this evidence, Brumfield repeatedly requested funding for expert witnesses and other investigative resources. *Brumfield v. Cain*, No. 04-CV-787, 2008 WL 2600140, at *13 (M.D. La. June 30, 2008) (describing state post-conviction proceedings). But the state court never ruled on those requests, and Brumfield was therefore unable to develop his *Atkins* claim. *Id.* The state habeas court ultimately denied Brumfield's request for an evidentiary hearing and dismissed his petition, finding he had not "demonstrated impairment based on the record." *Brumfield*, 135 S. Ct. at 2275.

After the Louisiana Supreme Court denied review, Brumfield petitioned for habeas corpus in federal court. The district court appointed new *pro bono* counsel, and Brumfield was able to develop the facts necessary to substantiate his *Atkins* claim for the first time after the Federal Public Defender Board provided funding for additional fact and expert discovery. *See Brumfield*, 2008 WL 2600140, at *3. Armed with these resources, counsel was able to procure and develop several sources of additional evidence that established Brumfield's intellectual disability.

First, counsel retained a neuropsychologist who, after administering a new IQ test (on which Brumfield scored a 69.9) and interviewing witnesses, concluded that Brumfield was intellectually disabled. *Id.* at *14.

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[3] In Louisiana, an IQ score of 70 or below generally indicates an intellectual disability. *See Brumfield*, 135 S. Ct. at 2277.

Two other psychologists (also provided for by the Public Defender Board) also testified that the prior IQ scores presented during Brumfield's initial sentencing hearing were inflated, and that Brumfield had been intellectually disabled since childhood. *Id.* On the basis of this evidence, the district court granted Brumfield's request for an *Atkins* hearing. And after counsel put forth "extensive evidence" of Brumfield's disability at that hearing, the district court concluded Brumfield was ineligible for execution. *Brumfield*, 135 S. Ct. at 2275-76. The Fifth Circuit ultimately agreed, after this Court vacated the Circuit's initial denial of habeas relief. *See Brumfield v. Cain*, 808 F.3d 1041, 1066 (5th Cir. 2015).

Without investigative and expert funding, Brumfield would remain on death row today. As the district court observed, the existing evidence of intellectual disability available during the state post-conviction hearing was insufficient to "put at issue the fact of mental retardation." *Brumfield*, 2008 WL 2600140, at *11. Only the "newly-presented evidence"—uncovered with the resources provided by the Federal Public Defender Board—substantiated Brumfield's *Atkins* claim and entitled Brumfield to an evidentiary hearing. *Id.* at *15.

2. *Williams v. Taylor*. In the case of Michael Wayne Williams, serious evidence of potential jury bias was only uncovered once his case reached collateral review in federal court. Virginia courts had denied his requests for funding. But an investigator hired by appointed federal habeas counsel discovered that the jury foreperson who had sentenced Williams to death had previously been married to a prosecution witness, and

had been represented by a prosecutor. Discovery of this evidence spared Williams his life.

Williams had been sentenced to death in Virginia in 1994 for the murders of Mary Elizabeth Keller and Morris Keller. *Williams v. Taylor*, 529 U.S. 420, 426 (2000). Bonnie Stinnett, the foreperson of the jury that convicted Williams and sentenced him to death, had previously been married to and had four children with a prosecution witness, Deputy Sheriff Claude Meinhard. During her divorce from Meinhard, Stinnett had also been represented by one of Williams's prosecutors. *Id.* at 440-41. But when asked during *voir dire* whether she was related to any of the witnesses or had previously been represented by any of the prosecuting attorneys, Stinnett failed to disclose these clear sources of potential bias. *Id.* The Court ultimately held that Stinnett's failure to honestly answer entitled Williams to an evidentiary hearing, and the district court thereafter found that Williams was entitled to a new trial. *See Williams*, 529 U.S. at 442; *Williams v. Netherland*, 181 F. Supp. 2d 604, 617 (E.D. Va.), *aff'd sub nom. Williams v. True*, 39 F. App'x 830, 834 (4th Cir. 2002) (per curiam).

Because the trial record contained no evidence suggesting that Stinnett's responses were misleading, her misrepresentations did not come to light during Williams's trial or direct appeal. *Williams*, 529 U.S. at 442. State habeas counsel—prompted by concerns about a different juror—filed a motion with the Virginia Supreme Court to fund an investigator "to examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case." *Id.* That court, however, denied counsel's motion, and dismissed

Williams's habeas petition without any development or consideration of the factual circumstances. *Id.*

Only after Williams filed a habeas petition in federal court did his court-appointed federal habeas counsel hire an investigator (at counsel's own expense) to interview the jurors from Williams's trial. Brief for Petitioner at 13 n.11, *Williams v. Taylor*, 529 U.S. 420 (2000) (No. 99-6615). During those interviews, two jurors referred to Stinnett by her former married name—"Meinhard"—revealing Stinnett's prior marriage. *Id.* That revelation prompted counsel to petition for an evidentiary hearing on the issue of juror bias. Although the district court denied the petition, and the Fourth Circuit affirmed, this Court unanimously concluded that an evidentiary hearing was warranted. *Williams*, 529 U.S. at 444.[4] On remand, the district court held an evidentiary hearing and granted Williams's habeas petition, voiding his conviction and death sentence. *Williams*, 181 F. Supp. 2d at 619. Before his second trial, Williams pleaded guilty, and he is currently serving a life sentence.[5]

As this Court observed in its opinion, Williams's counsel "had no reason to believe Stinnett had been

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[4] Williams had eaten his last meal and was less than an hour away from execution when this Court granted certiorari and a stay of his execution. *See* Frank Green, *Miscues Rule Out Execution for Killer*, Richmond Times-Dispatch, Apr. 21, 2003, at A1; *Williams v. Taylor*, 528 U.S. 960 (1999) (mem.).

[5] *See* Green, *supra* note 4; *see also Virginia Courts Case Information*, Cumberland County Circuit–Criminal Division, http://ewsocis1.courts.state.va.us/CJISWeb/circuit.jsp (indicating that Michael Wayne Williams pleaded guilty to all charges on August 22, 2003).

married to Meinhard or been represented by" Williams's prosecutor because "the factual basis [for Williams's jury bias claim] was not reasonably available to petitioner's counsel during state habeas proceedings." *Williams*, 529 U.S. at 443, 442. Without the funds for an investigator, this constitutional violation would never have been discovered and redressed, and Williams likely would have been executed.

3. *Campbell v. Johnson*. Robert James Campbell was also spared the death penalty once evidence of his intellectual disability was developed during federal habeas review. Counsel discovered previously withheld IQ tests from Campbell's academic and incarceration records and, based on those disclosures and with out-of-pocket funding, counsel was able to develop evidence of Campbell's disability. Ultimately, even the State conceded that Campbell was ineligible for the death penalty after its own expert agreed that Campbell was intellectually disabled.

Campbell was sentenced to death in 1992 by a Texas jury for the murder of Alexandra Rendon. *In re Campbell*, 750 F.3d 523, 526 (5th Cir. 2014). After *Atkins* was decided, habeas counsel began investigating the grounds for a potential *Atkins* claim. Counsel subpoenaed Campbell's schools for his academic records, which "show[ed] generally that Campbell had performed poorly in his academics [but] did not reflect any standardized intelligence testing." *Id.* at 527. Campbell also subpoenaed the Texas Department of Criminal Justice for any intellectual functioning tests, but was informed no such testing had been conducted upon incarceration. *Id.* Nonetheless, Campbell petitioned for

habeas in state court, relying on the school records and affidavits from Campbell's relatives and friends to assert that Campbell was intellectually disabled. *Id.* at 528. Finding the affidavits and "sparse school records" insufficient, the state court dismissed the petition. *Id.*

The Fifth Circuit thereafter denied Campbell's attempt to file a successive federal habeas petition,[6] because it found that Campbell failed to adequately make out an *Atkins* claim. *In re Campbell*, 82 F. App'x 349, 351 (5th Cir. 2003). Campbell then sought funding for intellectual-function testing from the district court under 21 U.S.C. § 848(q), Section 3599(f)'s predecessor statute, but the district court denied the motion in light of the Fifth Circuit's decision. Order at 1-2, *Campbell v. Johnson*, No. 00-CV-3844 (S.D. Tex. Dec. 5, 2003), ECF No. 42, *aff'd sub nom. Campbell v. Dretke*, 117 F. App'x 946, 959 (5th Cir. 2004). Campbell's execution was set for May 13, 2014. *Campbell*, 750 F.3d at 526.

The state, however, had never disclosed that it was in possession of three tests that suggested Campbell was intellectually disabled. *Id.* at 528. In 1991 the Texas district attorney's office had independently subpoenaed Campbell's school records and specifically requested "psychological testing." *Id.* at 527. The district attorney's office received records showing that Campbell had scored a 68 on an IQ test when he was nine years old and had scored in the "lowest range" on another IQ test when he was seven. *Id.* But that office never informed Campbell of the testing. *Id.* at 526–27.

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[6] Campbell had previously filed an unrelated, unsuccessful federal petition.

The Texas Department of Criminal Justice had also administered an IQ test to Campbell upon his incarceration, on which he had scored a 71, but those results were not produced in response to Campbell's subpoena. *Id.* at 527. Due to the state's omissions and misrepresentations, Campbell's counsel never had knowledge of these three IQ tests, all of which suggested that Campbell was intellectually disabled.

Two months before Campbell's execution date, newly obtained habeas counsel learned that the district attorney's office had independently subpoenaed Campbell's school records, and therefore learned of the prior testing. *Id.* at 528–29. Counsel then retained Dr. Leslie Rosenstein, a psychologist, to conduct a full evaluation of Campbell's intelligence (apparently at counsel's own expense).[7] *Id.* at 529. Dr. Rosenstein concluded that Campbell had an IQ of 69 and diagnosed him with "mild mental retardation." *Id.*

With this new evidence in hand, counsel successfully petitioned the Fifth Circuit for a stay of execution and authorization to file a successive federal habeas petition. *Id.* at 535. The state then retained its own expert, who agreed that Campbell was intellectually disabled. *See* Joint Advisory Concerning Campbell's Intellectual Disability Claim at 1-2, *Campbell v. Davis*, No. 00-CV-3844 (S.D. Tex. May 10, 2017), ECF No. 138. The state then joined Campbell in filing an advisory with the district court conceding that Campbell was

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[7] The district court made clear that counsel received neither federal nor state funding. *Campbell v. Stephens*, No. 00-CV-3844, slip op. at 5 n.4 (S.D. Tex. May 11, 2015), ECF No. 90.

"categorically excluded from execution." *Id.* at 7 (quoting *Atkins*, 536 U.S. at 318). As a result, the court found Campbell ineligible for execution. Order Conditionally Granting Writ of Habeas Corpus, *Campbell v. Davis*, No. 00-CV-3844 (S.D. Tex. May 10, 2017), ECF No. 139. Campbell was taken off death row and will be resentenced to life in prison.[8]

Based on the limited evidence available when counsel first sought funding in 2003, counsel was unable to substantiate Campbell's *Atkins* claim. This was not only because counsel had been misled about Campbell's prior IQ testing, but also because counsel lacked the resources to retain an expert to conduct a new IQ test. *Campbell*, 750 F.3d at 528. That doomed his request for funding, because the Fifth Circuit's "substantial need" standard demanded more. But ultimately, after new counsel learned of the prior testing and found resources to obtain new testing, the Fifth Circuit held that the newly developed evidence of intellectual disability was "more than sufficient to satisfy Campbell's burden." *Id.* at 532. Thus, the Fifth Circuit's imposition of its own heightened standard for expert funding left Campbell's fate up to sheer chance. If new habeas counsel had not fortuitously discovered evidence of Campbell's prior IQ testing or did not have the resources to obtain new

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[8] *See* Jolie McCullough, *Texan on Death Row Will Face Parole Review Instead of Execution*, Tex. Trib. (May 10, 2017), https://www.texastribune.org/2017/05/10/death-sentenced-man-will-instead-face-parole-after-supreme-court-rulin/.

testing, Campbell could very well have been wrongfully executed.

4. *Gonzalez v. Wong*. In the case of Jesse Gonzales,[9] significant impeachment evidence came to light only after his habeas petition arrived in federal court. That evidence destroyed the credibility of the jailhouse informant who was key to the prosecution's aggravation case and resulted in a second chance for Gonzales to present his claims in state court.

Gonzales was convicted for first degree murder of a police officer during a drug raid on Gonzales's parent's home. *See People v. Gonzalez*, 800 P.2d 1159 (Cal. 1990). The penalty phase of his capital case focused largely on whether Gonzales had known that the victim was a police officer. While Gonzales maintained that he had mistaken the officers as rival gang members, the state presented the testimony of William Acker, a jailhouse informant, who claimed that Gonzales had admitted that he had been warned that police would raid the home, and that he planned in advance to "bag a cop." *Gonzalez v. Wong*, 667 F.3d 965, 973, 1002 (9th Cir. 2011). Gonzales's first sentencing ended in a hung jury, but a second jury sentenced Gonzales to death, apparently finding Acker's testimony credible. *Id.* at 976.

Following Gonzales's sentencing, a Los Angeles County grand jury investigation into then-recent perjury indictments of jailhouse informants revealed that the prosecutor's office had used fabricated

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[9] As noted by the Ninth Circuit, it appears that Gonzales's name has been spelled incorrectly in the case caption since his original trial. *See Gonzalez v. Wong*, 667 F.3d 965, 972 n.1 (9th Cir. 2011).

confessions from jailhouse informants in a number of cases between 1979 and 1988. *See Maxwell v. Roe*, 628 F.3d 486, 499 (9th Cir. 2010). That revelation prompted Gonzales's post-conviction counsel to seek additional discovery related to Acker's testimony. *Gonzalez*, 667 F.3d at 967. The California state courts denied those requests, *id.*, and so the facts about Acker's testimony went undeveloped.

Gonzales filed for federal habeas relief and the district court granted counsel's request for additional discovery. *Id.* Counsel then obtained evidence that cast serious doubt on Acker's credibility, including six psychological reports prepared by prison psychologists revealing that Acker "had a severe personality disorder, was mentally unstable, possibly schizophrenic, and had repeatedly lied and faked attempting suicide in order to obtain transfers to other facilities." *Id.* Because this evidence had not been presented in state court, the Ninth Circuit stayed the case to allow Gonzales to present his potentially meritorious claim in state court in the first instance. *Id.* at 984. To *amici*'s knowledge, the petition remains pending in state court.[10]

But for the additional resources federal habeas counsel dedicated to investigating the potential impeachment issues, counsel would never have learned about Acker's mental health history. Absent that

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[10] *See* Case No. S208922, Docket, California Supreme Court, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2038864&doc_no=S208922 (last updated June 13, 2017, 2:09 PM).

investigation, Gonzales would have been deprived of a chance to challenge his death sentence in state court.

5. *Porter v. McCollum*. Although the statutory provision at issue in this case applies only to habeas cases in federal court, examples of successful post-conviction investigations are not limited to those that occur in federal court. Instances of similar investigations that have been conducted in state habeas proceedings reinforce the basic point: when counsel has an objectively reasonable basis to investigate a claim, investigative and expert resources can be essential to substantiating that claim.

For instance, in *Porter v. McCollum*, 558 U.S. 30 (2009), this Court summarily reversed the Eleventh Circuit's denial of habeas relief, based on substantial mitigation evidence that was developed for the first time during state post-conviction proceedings. George Porter was sentenced to death for the murders of Evelyn Williams and Walter Burrows. His trial counsel conducted a very minimal mitigation investigation in which counsel "failed to explore, investigate, or even consider" several potential ground for mitigation, and presented only a single (ultimately harmful) witness during the sentencing hearing. *Porter v. Crosby*, No. 6:03-CV-1465, 2007 WL 1747316, at *23, *26 (M.D. Fla. June 18, 2007).

During state post-conviction proceedings, counsel from the Capital Collateral Regional Counsel office—a state-funded agency that provides legal services for post-conviction collateral proceedings in capital cases, *see, e.g.*, Fla. Stat. Ann. §§ 27.701, 27.711—investigated previously ignored circumstances of Porter's

background. That investigation revealed details about Porter's troubled childhood (which included routine beatings by his father), his placement in remedial classes, his traumatic military service during the Korean War, his struggles with Post-Traumatic Stress Disorder thereafter, and a forensic neuropsychologist's expert assessment that Porter had a low IQ and suffered from a brain condition that could manifest in impulsive and violent outbursts. *See Porter*, 558 U.S. at 33-34; *Porter*, 2007 WL 1747316, at *27.

On the basis of this evidence, this Court summarily reversed the Eleventh Circuit's denial of petitioner's habeas claim, and concluded that trial counsel had been ineffective in failing to conduct an adequate mitigation investigation under *Wiggins v. Smith*, 539 U.S. 510 (2003). The Court found it "objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented." 558 U.S. at 31. On remand, the Eleventh Circuit vacated Porter's death sentence. *Porter v. Att'y Gen.*, 593 F.3d 1275, 1275 (11th Cir. 2010).

Other federal courts have granted similar claims based on evidence first uncovered by investigations conducted in state post-conviction proceedings. For example, in one case the Eleventh Circuit granted habeas relief based on expert testimony demonstrating the petitioner's limited intellectual functioning, testimony about petitioner's childhood beatings at the hands of family members, and other evidence that was only discovered during post-conviction proceedings.

DeBruce v. Comm'r, Ala. Dep't of Corr., 758 F.3d 1263, 1272 (11th Cir. 2014). Because of the "paucity of mitigating evidence actually presented" at trial, the jury had been provided with "almost no reason to spare [petitioner's] life." *Id.* The reason this evidence was not developed during trial was because trial counsel "did not have the funds to pay for" a mitigation investigator, and trial counsel failed to conduct his own investigation because he "just didn't have time." *Id.*

6. *Milke v. Ryan*. Debra Milke was sentenced to death by the state of Arizona for the murder of her four-year-old son, Christopher, based largely, if not exclusively, on the testimony of Police Detective Armando Saldate, Jr. *Milke v. Ryan*, 711 F.3d 998, 1001 (9th Cir. 2013). Saldate asserted that Milke had confessed to him shortly after the murder. *Id.* Milke denied the confession and proclaimed her innocence. *Id.* Saldate's testimony was the only direct evidence of Milke's confession: there was no recording, written statement, or any other evidence of the confession. *Id.* at 1018.

Prosecutors relied on Saldate's testimony to convict Milke and sentence her to death without disclosing that Saldate had a long history of "habitually" lying under oath and ignoring the constitutional rights of interviewees. *Id.* at 1001, 1019. It was not until state post-conviction proceedings that this evidence, and the state's withholding of it in violation of due process, came to light. As the Ninth Circuit described:

> Milke was able to discover the court documents detailing Saldate's misconduct only after a team of approximately ten researchers in post-

> conviction proceedings spent nearly 7000 hours sifting through court records. Milke's post-conviction attorney sent this team to the clerk of court's offices to search for Saldate's name in every criminal case file from 1982 to 1990. The team worked eight hours a day for three and a half months, turning up 100 cases involving Saldate. Another researcher then spent a month reading motions and transcripts from those cases to find examples of Saldate's misconduct.

Id. at 1018.

Although the state courts and the federal district court initially rejected her petition, the Ninth Circuit found a prejudicial *Brady* violation and granted habeas relief. *Milke*, 711 F.3d at 1018. Today, Milke lives in the suburbs of Phoenix.[11]

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These cases demonstrate that when counsel has an objectively reasonable basis for exploring a habeas claim, funding for investigative and expert resources are critical to developing that claim. Although the cases above largely involve investigations funded by Federal Public Defenders' offices, legal defense organizations, or counsel themselves, the results prove that subjecting prisoners to the heightened standard applied by the Fifth Circuit could lead to a miscarriage of justice. Had

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[11] *See* Michael Kiefer, *Debra Milke's New World After a Half-Life on Death Row*, Ariz. Republic (Aug. 1, 2015 8:26 AM), http://www.azcentral.com/story/news/local/phoenix/2015/08/03/debra-milkes-new-world-half-life-death-row/30974639/.

counsel in each case above requested resources under Section 3599(f), funding likely would not have been forthcoming under the Fifth Circuit's "substantial need" test, and evidence of the constitutional violations that ultimately spared the lives of the defendants would not have come to light.

Indeed, in several of these cases, courts commented on the similarly onerous standards state courts had applied to requests for funding in state collateral proceedings—which, like the Fifth Circuit, effectively required a showing of a meritorious claim *before* allowing funding to explore such a claim. For instance, in Brumfield's case, the district court lamented the "particularly cruel and unreasonable catch-22" applied by the state habeas court, which required a *prima facie* showing of an *Atkins* claim before funding would issue. As the district court explained, "without expert funding, no *prima facie* showing is likely possible, yet without a *prima facie* showing, no expert funding is forthcoming." *Brumfield v. Cain*, 854 F. Supp. 2d 366, 378 (M.D. La. 2012). Similarly, in Williams's case, although state habeas counsel petitioned the Virginia Supreme Court for investigative resources, that court denied the request because of Williams's "vague allegations." *Williams*, 529 U.S. at 442. But as this Court later explained, that vagueness "was not the fault of [Williams]"; instead "[t]he underdevelopment of these matters was attributable to," if anyone, the jury foreperson and prosecutor. *Id.* at 442–43.

In each case, counsel had an objectively reasonable basis to dedicate investigative and expert resources to pursuing meritorious habeas claims, even though those

claims could not be fully substantiated without additional resources. Each case thus would satisfy Section 3559(f)'s requirement that funding be "reasonably necessary." 18 U.S.C. § 3599(f); *see* Pet'r Br. at 24 (explaining that Section 3599(f) is satisfied whenever "a reasonable private attorney allocating limited resources would use them").

II. The Fifth Circuit's Standard Discourages Attorneys Who Rely On The Criminal Justice Act From Seeking Resources Or Even Accepting Capital Habeas Cases Altogether.

The Fifth Circuit's "substantial need" standard does more than prevent the discovery of critically important evidence that can support a meritorious habeas claim. It also poses several practical barriers for federal habeas attorneys in the Fifth Circuit. These roadblocks may discourage counsel from even seeking funding to undertake an investigation. And, in some cases, counsel decline to represent federal habeas petitioners in the Fifth Circuit altogether because they know they will not be able to do an adequate job without resources for investigations and experts.

The testimony of practitioners and experts during hearings conducted as part of the Ad Hoc Committee to Review the Criminal Justice Act ("CJA") illustrates these facts. That committee, appointed by the Chief Justice of this Court, is composed of several leading federal judges, as well as attorneys, administrators, and scholars. *See CJA Study Committee Begins Accepting*

Comments, United States Courts (June 8, 2015).[12] The committee has been tasked with conducting a comprehensive, impartial study of the CJA and the defense services it provides for indigent criminal defendants. *Id.* While its report is not yet finished, the committee has held public hearings across the country and published the transcripts of those hearings. One hearing, conducted in Birmingham, Alabama, focused particularly on capital cases.[13] Testimony elicited during

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[12] http://www.uscourts.gov/news/2015/06/08/cja-study-committee-begins-accepting-comments; *see also Frequently Asked Questions*, Committee to Review the Criminal Justice Act Program, https://cjastudy.fd.org/frequently-asked-questions (last visited June 15, 2017).

[13] Witnesses who testified before the committee discussed both judicial districts in which a Capital Habeas Unit ("CHU") has been established and those in which no CHU has been established. Those units, when established in the district's Federal Public Defenders' office, afford habeas petitioners with access to appointed counsel that have their own independent appropriation. CHU counsel need not rely on Section 3599(f). But where CHUs do not exist, the majority of federal habeas petitioners must rely on appointed counsel, who must seek resources under Section 3599(f). *See* Ad Hoc Committee to Review the Criminal Justice Act, Public Hearing, Birmingham, Ala., *Transcript: Panel 3—Views on Death Penalty and Capital Habeas Representation*, at 4 (Feb. 18-19, 2016) (testimony of Richard Burr, Member, Tex. Regional Habeas and Assistance Project), https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/final-cja-birminghampanel-3.pdf.

As of 2016, without support from a CHU, more than half of federal habeas petitions in Texas raised only record-based claims that require no investigation (and that succeed only on very rare occasions). *See* Memorandum from Richard Burr, Member, Tex.

that hearing described the many challenges counsel face in obtaining investigative and expert funding in post-conviction proceedings.

As an initial matter, counsel must devote considerable time and resources solely to litigating the threshold issue of access to funding. That litigation squanders capital habeas counsel's already limited resources. *See* Ad Hoc Committee to Review the Criminal Justice Act, Public Hearing, Birmingham, Ala., *Transcript: Panel 3—Views on Death Penalty and Capital Habeas Representation*, at 5 (Feb. 18-19, 2016) (testimony of Richard Burr, Member, Tex. Regional Habeas and Assistance Project) (hereinafter "Committee to Review CJA Tr.").[14] By necessity, CJA counsel are forced to "engage in extensive advocacy, at a CJA rate of $181.00/hour, to request investigative services that cost half as much." Memorandum from Richard Burr, Member, Tex. Regional Habeas and Assistance Project, to Committee to Review the Criminal Justice Act Program, at 6-7 (Feb. 8, 2016) (hereinafter "Burr Written Testimony").[15] Because

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Regional Habeas and Assistance Project, to Committee to Review the Criminal Justice Act Program, at 2 (Feb. 8, 2016), https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/dickburrbirminghamwrittentestimony-done.pdf.

[14] https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/final-cja-birminghampanel-3.pdf.

[15] https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/dickburrbirminghamwrittentestimony-done.pdf.

counsel typically must also seek to proceed *ex parte* in order to avoid disclosing defense strategy, and because counsel frequently face government opposition in doing so, by the time CJA counsel are able to secure funding, the fees counsel have *already* expended "may be as much or more than the funding sought." *Id.* at 7.

Next, counsel must litigate these threshold issues of access to funding while also contending with the one-year statute of limitations for federal habeas claims. *See* 28 U.S.C. § 2244(d)(1). Delays in the process of litigating and obtaining funding "too often mean[] that, even if the requested services are eventually authorized, they arrive too late for counsel to make effective use of the services." Burr Written Testimony at 7; *cf.* Hon. Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View From the Federal Bench*, 36 Hofstra L. Rev. 819, 827 (2008) (explaining that "developing mitigation evidence is time-consuming," because "[i]t takes months to conduct the interviews and amass the information needed and cull it to a presentable form").

Overall, these practical difficulties in obtaining expert and investigative resources pose a direct disincentive to even seeking those resources in the first place. In fact, "CJA panel attorneys are seven times less likely to use experts in habeas corpus proceedings or even ask for them as capital habeas units, where [attorneys] have their own funding and they have their own experts." Committee to Review CJA Tr. at 8 (testimony of Mark Olive, Nat'l Habeas Assistance and Training Counsel).

When this happens, an attorney is left to conduct an investigation of potential mitigating or exculpatory evidence, petitioner's intellectual capacity, or other matters, entirely on her own. But attorneys are ill-equipped to conduct these types of specialized investigations on their own. *See, e.g.*, *DeBruce*, 758 F.3d at 1272 (noting that, without funding, trial counsel explained he "just didn't have time" to conduct a mitigation investigation); Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 Wash. Univ. L. Rev. 581, 620 (2012) (explaining, based on interviews with thirty mitigation specialists, that when courts denied motions to fund mitigation specialists, "defense counsel were left to conduct the mitigation investigation themselves, even though they had no experience conducting mitigation investigations and admitted they did not know how to conduct a mitigation investigation").

The September 2010 Report to the United States Judicial Conference's Committee on Defender Services echoes concerns about counsel with limited funding or experience. *See* Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, at 88-89 (Sept. 2010).[16] If counsel with

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[16] http://www.uscourts.gov/sites/default/files/fdpc2010.pdf. This report was an update to the so-called "Spencer Report" released in 1998. The Spencer Report was prepared by the Judicial Conference's Subcommittee on Federal Death Penalty Cases, composed of three federal district judges, and was "prompted by

limited or no capital habeas experience are appointed in capital habeas proceedings, the report noted, a failure "to fully investigate potential post-conviction claims, particularly those requiring investigation outside the trial record and relating to the penalty phase" can follow. *Id.* at 88. Post-conviction specialists interviewed for the report emphasized "the number of instances in which viable claims of [intellectual disability] and other mental conditions were either overlooked or insufficiently developed," and stated that the "inadequacy of post-conviction mitigation investigation in general was a focal point of concern." *Id.* However, the report noted that judges may be "reluctant to grant the resources necessary to fulfill post-conviction counsel's duty to conduct an independent outside-the-record investigation." *Id.* at 88-89.

These are generally not investigations that counsel can conduct on his or her own. Take, for example, the investigation Petitioner in this case seeks to conduct. *See* Pet'r Br. at 19-20. Among other things, developing and drawing out potential mitigating evidence,

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judicial and congressional concerns about the costs involved in providing defense services in federal death penalty cases." Hon. James R. Spencer, Hon. Robin J. Cauthron & Hon. Nancy G. Edmunds, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, at 6 (May 1998), http://www.uscourts.gov/sites/default/files/original_spencer_report.pdf (citing to unpaginated pages of PDF). The Report studied the "cost, quality and availability" of representation in federal capital cases, and made a number of recommendations to "contain[] costs while ensuring high quality defense services in capital cases," which the Judicial Conference approved in September 1998. Gould & Greenman, *supra*, at viii.

establishing trust with family members and potential witnesses, and remaining alert to potential intellectual or psychological conditions requires a unique and specialized set of professional skills. *See* Berrigan, *supra*, at 825, 828. For this reason, mitigation specialists typically hold psychology or social work degrees and, unlike attorneys, are "trained in uncovering family trauma and screening for often subtle mental and psychological disorders." *Id.* at 828; *see also* Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must be Included on the Capital Defense Team*, 31 Hofstra L. Rev. 1143, 1149 (2003) (explaining that mitigation specialists' analyses often "lead[] to the identification of issues requiring assessments by psychologists, psychiatrists and other experts"). Moreover, the sort of investigation conducted by a mitigation specialist "falls outside the expertise of the traditional fact investigator whose job is to assist the attorneys in determining 'what' happened" and focuses, instead on evidence that reveals "'why' the offense occurred and reasons why the death penalty is not the appropriate punishment." Leonard, *supra*, at 1151.

In light of these daunting realities, attorneys may decide that the inability to secure adequate funding for investigators and experts precludes them from undertaking a capital habeas petitioner's representation in the first place. During his testimony before the Ad Hoc Committee to Review the CJA, Richard Burr emphasized this consequence. Mr. Burr was invited to testify based on his extensive experience with capital defense litigation, including as the Director of the NAACP Legal Defense Fund's Capital Punishment

Project, Litigation Director of the Texas Resources Center, and counsel of record in *Ford v. Wainwright*, 477 U.S. 399 (1986). Mr. Burr observed that qualified in-state lawyers who "could do a great job" nevertheless do not take on a case until "they know they can get the funding" for an adequate investigation and experts. Committee to Review CJA Tr. at 32 (testimony of Richard Burr). Moreover, "the battle to get funding for resources for investigation and experts" serves as a "huge deterrent" for out-of-state lawyers interested in taking a Texas habeas case. *Id.* Those counsel understand that "without those resources they cannot do their job." *Id.*

Ultimately, in addition to foreclosing the discovery of critical evidence, applying the Fifth Circuit's "substantial need" standard hinders habeas investigations in that Circuit by increasing the costs necessary to obtain that funding, discouraging counsel from seeking it, and even leading counsel to decline to take on representation altogether. These results cannot be reconciled with Congress's intention that investigative and expert resources be available in post-conviction proceedings whenever "reasonably necessary for the representation." 18 U.S.C. § 3599(f).

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

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Respectfully submitted,

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